THE BULLETIN

OF THE

National Tax Association

Editor
HARLEY L. LUTZ

Consulting Editor
ALFRED E. HOLCOMB

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H. L. LUTZ, EDITOR
A. E. HOLCOMB, CONSULTING EDITOR

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THE FIFTEENTH CONFERENCE

The fifteenth conference of the National Tax Association was opened on Monday evening, September 18th, in the ball room of the Curtis Hotel, Minneapolis. The Monday evening session was devoted to addresses of welcome and responses by members of the Association; and the keynote of hospitality and friendliness set by Mayor Leach of Minneapolis, and Lieutenant-Governor Collins, gave promise of a most cordial and enthusiastic reception on the part of the city and state. This promise was abundantly fulfilled, as the members of the association who were present will all testify. Responses on behalf of the association were made by Judge William A. Hough, of the Indiana tax commission, and Mr. J. T. White, Solicitor to the Treasury of Ontario.

The Secretary announced an interesting innovation in the matter of program arrangement in the presentation of the annual review of tax legislation at the opening session. This was done for the purpose of enabling members to refresh their memories concerning the course of recent tax legislation. A very able paper on this subject had been prepared by Mr. William E. Hannan, reference librarian of the New York state library.

Tuesday

Judge J. G. Armson, of the Minnesota tax commission, presented a very able paper on tax limitations, with special reference to Minnesota, at the morning session. Judge Armson announced that originally he had favored no limitations on the taxing power, but his practical experience as a tax administrator had driven him to the conclusion that some limits were necessary because of the indifference of the many who pay taxes, and the interested activity of the few who levy them. The general restrictions of the legislative local taxing bodies in Minnesota were outlined and emphasized.

A second topic presented at the morning session was the work of a special tax commission. Professor J. E. Brindley outlined the problems which had come before the Iowa special commission, and the principal recommendations which this commission has developed. Mr. George Lord, chairman of the special tax commission in

Michigan, emphasized one question, that of road-building, which had come before the Michigan commission. Mr. Lord emphasized also the importance of adequate publicity for taxation problems and proposed that the National Tax Association organize a small corps of lecturers who might be used to disseminate knowledge concerning the more important aspects of modern state and local taxation. Mr. Haugen spoke briefly of the problems in Montana.

A third topic on the morning program was the report of the committee on the Taxation of Migratory Live Stock, presented by the chairman of the committee, Mr. William Bailey of Utah. The report emphasized the diversity of practice and decisions in public land states, and a model statute was appended to the report for the purpose of promoting greater uniformity of procedure in these states. The committee recommended that migratory live stock should be taxed but once, and that the tax should be apportioned among the different states according to the length of time spent in these states.

The Tuesday afternoon session was devoted to taxation problems in the Canadian provinces. Professor D. A. MacGibbon of the University of Alberta reviewed the recent attempts of Alberta cities to secure a wider tax base. The failure of the plan for the exemption of improvements has been even more pronounced with the passing of the boom, and the Canadian provinces and municipalities have been obliged to develop numerous substitutes. At present, the sentiment appears to be moving in the direction of income taxation.

Professor A. B. Clark's paper on the tax reform movement in this province was read by Mr. W. L. Donley, chairman of the tax commission of Manitoba. Professor Clark discussed the problems involved in the development of provincial income taxes, and recommended the use of such a tax with provincial assumption of a portion of certain local burdens, such as education. Mr. Leason, surveyor of taxes for British Columbia, commented on plans which British Columbia was making for additional sources of revenue.

At this session also, Mr. Hallanan, tax commissioner of West Virginia, discussed the results of the sales tax experiment which was described at Bretton Woods a year ago. The tax has been satisfactory from the revenue standpoint, and has not proved to be unduly burdensome so far as the interstate business of West Virginia is concerned.

The Tuesday evening session was devoted to a report from the committee on the taxation of forest lands, presented by Professor F. R. Fairchild of Yale University, chairman of the committee. The problem which the committee faced was that of fitting forestry taxation into the general scheme of taxation under the model plan. It was recognized, the committee concluded, that incomes from forest property should be taxed as other incomes were to be taxed. The fact that the income is derived from forests give rise to no special problems at this point. The principal difficulty is encountered in the attempt to apply some kind of property tax to the standing timber. The committee proposed that a proper tax policy should distinguish between young and mature timber. Young timber might be exempted, and the land assessed simply as bare land with a yield tax on forest products at about five per cent. Mature timber presents a different problem, but the committee concluded that taxation was not an important factor in timber depletion, nor in reforestation. After discussing various possible courses, the conclusion was reached that the best plan would be to make a property tax as equitable and convenient as possible. This would require a fair assessment of forest property and a fair equalization. The committee was asked to continue its study of the subject with a view to preparing model tax laws covering its recommendations.

Wednesday

The Wednesday morning session was devoted to a report of the committee on the taxation of interstate public utilities. Senator F. M. Davenport of New York, as chairman of the committee, presented the report, which covered the system of taxing public utilities. Consideration of methods of apportionment and the determination of proper rates of tax were deferred, pending further study. The system of earnings taxation was proposed as the most desirable type of tax for public utility corporations. The com-

mittee discerned a rather general tendency in the direction of earnings taxation for all classes of public utilities; and in its summary of the merits of this plan, the admitted defects of the ad-valorem system were strongly emphasized. An alternative gross or net earnings tax was suggested for some future discussion, with allowance for taxes on real estate.

In the afternoon, Mr. Carl S. Lamb of Pittsburgh presented a report for the committee on the apportionment between states of taxes on interstate mercantile business. The committee recommended the use of two factors, property and business done within the state for the purpose of apportioning the net income to be taxed under the business tax. Property was to be allocated after the elimination of intangibles; and business done was to be determined on the basis of wages plus materials and supplies, plus sales. Account is to be taken of important items of both income and outgo in determining business done within the state. Wages and salaries would be assigned to the office from which the workers are sent out, and purchases to the office in which the negotiations are handled.

Mr. C. A. Drake, head of the capital stock division of the treasury department, presented an able paper on certain administrational aspects of the federal capital stock tax.

The president of the association, Mr. Samuel Lord of the Minnesota tax commission, gave his presidential address on Wednesday evening. He emphasized the attitude of the association with regard to the repeal of the federal inheritance tax and the removal of the menace of tax-exempt securities, and urged that the association continue its work to attain these ends. He revived again the discussion of bank taxation and stressed the necessity of prompt and vigorous action on the part of Congress in order to save the situation in a number of states.

Thursday

The topic for the morning session had been planned with a view to developing the real significance of the income tax in modern tax systems. The discussion of the morning did not, however, realize the possibilities which had been outlined on the program. Interesting comments were presented on the income tax systems of Wisconsin, New York and Massachusetts, and on the results of classification in various states. But there was no consideration of the really important topics which are involved in the use of the income tax, such as the true place of the income tax in the state tax system; the relation of the income tax and the property tax; the proper treatment of intangibles, and the extent to which, if at all, property should be exempted when the income from this property is taxed. Some of these are burning questions which will sooner or later engage the serious attention and best thought of the conference.

On Thursday afternoon, Dr. T. S. Adams of Yale University discussed in a very interesting and illuminating fashion some of the problems which are met with in the drafting and enactment of a federal revenue law. Dr. Adams views tax legislation as a problem fundamentally political in character, and he emphasized in his address the great possibilities of education in securing changes and improvements in the law. He stressed the need of still greater publicity and of an organization to supply the public with more complete information. He suggested that the federal government needs an organization with the spirit and personnel of the best state tax commissions, in order to provide the government with men who are willing to make their department and their work a career.

The committee on bank taxation presented its report at the afternoon session. The chairman of the committee, Senator W. W. Law of New York, read the report, which followed the lines of the arguments and general conclusions presented at the 1921 conference. The committee recommended that the conference approve of the Kellogg Amendment to Section 5219, which would provide for the taxation of banks on the same basis as other moneyed capital used in banking, or permit an income tax on the income from such banks. A strong and, to our mind, a convincing argument was advanced against the view that national banks are to be regarded as federal agencies. An active discussion of the bank tax matter held the attention of the delegates until six o'clock. The argument of those who oppose such legislation as that contemplated in the Kellogg Bill

appears to be based on the fear that banks will be discriminated against in some states. This objection appears to be quite specious.

Two important matters were presented at the session on Thursday evening. The association's committee on inheritance taxation presented its report through the chairman, Mr. William B. Belknap of Louisville. After outlining the various possible plans for apportioning the tax, the committee recommended a model inheritance tax law which represents marked improvement at various points upon the model statute presented at the fourth annual conference. The difficult question of the extent to which the law of domiciles should control the proceeds received from inheritance taxes gave rise to a minority report, although it did not prevent agreement among the committee members concerning the steps that should be taken immediately to correct the present intolerable situation in use of the inheritance tax by the states.

At this session also, Mr. George Vaughan of Arkansas discussed the taxation of natural resources, presenting a view similar to that outlined in his paper in the May *Bulletin*.

Friday

Great interest was shown in the subject assigned for Friday morning, which was limitations on expenditures and taxes. It was generally agreed that one of the most fruitful ways of reducing taxes was by reducing expenditures, and a special committee was formed for the study of public expenditures. Judge William A. Hough and Mr. Philip Zoercher of the Indiana board of tax commissioners, emphasized the achievements which have been possible in Indiana under the system of centralized control of expenditures in operation in that state. This subject is one which will unquestionably engage the attention of further conferences to an increasing degree.

Among the matters presented at the afternoon session, the paper by Mr. M. S. Howard of New York on the standardization of tax commission reports, deserves mention. His suggestion that a special committee be appointed to plan a model tax commission report was adopted.

A very impressive memorial service was held in honor of the late Samuel T. Howe of Kansas. Appreciative addresses regarding the fine spirit and able services rendered by Mr. Howe were delivered by Mr. Rowan and Mr. Foster of the Kansas tax commission, Professor Brindley, Mr. Lord of Minnesta, Mr. Link of Colorado, and Senator Vaughan of Arkansas.

The nominating committee proposed Dr. Thomas S. Adams of Yale University as President of the association for the ensuing year, and Mr. William Bailey, chairman of the state board of equalization of Utah as Vice-President; and for members of the executive committee, Mr. Charles J. Tobin, Albany, New York; Mr. J. Vaughan Gary, Counsel to the state tax board of Virginia; and Mr. H. L. Eveland, chairman of the state tax commission of South Dakota. These nominees were unanimously elected. The more important resolutions adopted by the Conference included the following:

RESOLVED, That the thanks of the Conference be extended to:

The Committee on Arrangements, Mr. H. J. Burton, Chairman

The Minnesota Tax Commission,
Mr. Samuel Lord, Chairman,
Mr. N. A. Nelson, Secretary,
Mrs. B. M. Hoatson

Minneapolis Civic and Commerce Association,
Mr. H. H. Gardner, Manager
Mr. F. L. Olson

Mr. W. L. Harris

League of Women Voters, 5th District
Mrs. R. H. Carpenter, Secretary
Mrs. T. E. Cobb, Chairman of Committee

Minneapolis Real Estate Board
Mr. H. H. Nelson

Washburn-Crosby Company

Mr. C. E. Hall of the Northwestern Bell Telephone Company

Mr. G. L. Fort, City Assessor

Mr. Al. P. Erickson, County Auditor

Mr. C. T. Moffett.

Northwestern Bell Telephone Company

The Management of the Curtis Hotel

The Associated Press of Minneapolis and St. Paul

to whose efforts, exerted in too many ways to reward, the success of the Conference and the pleasure of the delegates, and especially that of the ladies accompanying them, is attributable.

RESOLVED, That this conference reaffirms the position taken by the 13th Annual Conference on Taxation held in Salt Lake City, Utah, on September 10th, 1920, with reference to opposing the exemption from income taxation of the salaries of all public officials and of the interest on future

issues of federal, state or municipal obligations, and hereby recommends the submission by the 66th Congress and the ratification by the states of an amendment to the Constitution of the United States which will permit the principle thus stated to be embodied in our national income tax law.

WHEREAS, it is recognized that a uniform rule of apportionment, for taxation purposes, of the net business income of mercantile and manufacturing concerns whose business is conducted in more than one State, is essential in order that fairness and equity may prevail,

THEREFORE BE IT RESOLVED, that the Fifteenth National Tax Conference hereby urges the adoption of a uniform rule by states calculated to fairly and equitably apportion such net business income.

WHEREAS, The existing law regarding the taxation of the shares of National Banks places a limitation upon the tax which may be imposed by the states which is out of harmony with the present tax laws of some twenty states and which must tend to discourage more improved methods of taxing intangible personal property in all the states, and

WHEREAS, a considerable amount of litigation has already been undertaken in relation thereto which, if successful, will place the National Banks in a favored class among taxpayers, be it hereby

RESOLVED, that the National Tax Conference favors the speedy amendment of Section 5219 of the United States Revised Statutes so as to provide that the tax imposed upon the shares of national banking associations shall not be at a greater rate than is assessed upon other moneyed capital employed in the business of banking, and to confirm to the states the right to assess or reassess any taxes heretofore paid, levied or assessed upon the shares of national banks, which were levied at no greater rate than those levied upon similar state institutions; as is provided, for example, in the Kellogg Bill, S. 3696.

WHEREAS, at the first conference of the National Tax Association, held in 1907, it was resolved that it was the sense of that conference that inheritance taxes should be reserved wholly for the use of the several states, which resolution has been reaffirmed at subsequent conferences;

AND WHEREAS, inheritance taxes have not heretofore been imposed by the federal government, except as emergency measures in times of war;

AND WHEREAS, the federal estate tax now in force imposes an unduly heavy burden of expense upon the estates of deceased persons, in addition to the tax itself, out of proportion to the revenue received by the government, seriously interferes with the administration of such estates and delays final settlements;

BE IT RESOLVED, That the estate tax should be recognized by Congress as a war measure only and should be repealed at the earliest possible moment.

RESOLVED, That the National Tax Association be requested to continue its committee on forestry taxation and that such committee be requested to make a detailed study of the situation with regard to forest taxation in the several important timber producing sections of the country, with a view to the preparation of a model tax law or model tax laws, for submission to the next conference, and to formulate plans for financing and conducting this study and to present such plans to the executive committee, which shall have power to approve or disapprove such plans.

Those who attend a conference cannot always realize the amount of groundwork and detail that is involved in making the gathering a success. Weeks and even months before we assembled in Minneapolis these numerous details were being handled by the local committee, so that when the visitors arrived the signs were up, hotel reservations were ready, and the whole stage was set for the big show. The officers of the association, as well as those members who attended the conference, are under a deep obligation to the local committee on arrangements. Every detail which could in any way promote the success of the conference or increase the comfort of the visiting members had been carefully looked after. A most delightful program of entertainment and sight-seeing had been arranged for the visiting ladies, and guest cards in various clubs were issued to all delegates.

Mr. H. J. Burton of Minneapolis, as chairman of the committee on arrangements, supervised all of these details without ostentation but in a most efficient manner, and crowned his achievements by turning in fifty-three new paid-up memberships in the association. These members include some of the most prominent and public-spirited citizens of the twin cities, and many of them are likely to remain permanently with us. Mr. Burton and all the members of his committee are deserving of our most hearty vote of thanks.

Mrs. Oscar Leser has kindly furnished the following notes on the very delightful program which had been arranged for the entertainment of the visiting ladies:

When the National Tax Conference met at the Curtis Hotel at Minneapolis, September 18, 1922, not only was there an unusual number of delegates present, but many were accompanied by their wives and sisters. These women who were fortunate enough to be present, enjoyed to the fullest the open-handed hospitality ex-

tended them by the people of this beautiful city.

With a fleet of machines at their disposal the visitors drove through the lovely lake regions, parks, to the falls, country clubs, University of Minnesota, art galleries, to the flour mills, telephone exchange of Minneapolis, and the drives were extended to the choice parts of St. Paul, where the visitors were entertained at the beautiful University Club. To Mr. W. L. Harris, of the New England Furniture Company of Minneapolis, visiting ladies are indebted for a delightful luncheon and entertainment. At the home of Mrs. Louis L. Swarthe, and also at the cosy club house of the Republican women, they were shown special hospitality. The T. B. Walker art collection was a revelation to the party, containing as it does a goodly collection of some of the finest specimens of the world's masters. One of the party said she left envying Minneapolis this little treasure box. The women visitors, who represented eighteen states, enthusiastically acknowledge the many courtesies shown them by Mrs. Sumner T. McKnight, Mrs. F. E. Cobb, Mrs. C. H. Chalmers, Mrs. E. W. Hathaway, Mrs. E. J. Andrews, Mrs. Louis Swarthe, Mrs. J. A. Quint, Mrs. J. B. McMillan, and Mrs. B. M. Hoatson. Chief Clerk of the State Tax Commission of Minnesota, and also to the members of the men's committee.

PERSONAL

Mr. Clarence Smith was appointed to the Kansas tax commission to succeed the late Samuel T. Howe. Mr. Smith had been the secretary to the commission for many years.

LEGISLATION IN NEBRASKA

Mr. Philip H. Bross, secretary of the department of finance, sends the following account of recent *Nebraska* legislation:

The last Legislature repealed all special mill levies except the capitol fund levy, and established a consolidated state tax. This action included the repeal of the university and normal school levies.

The end of the fiscal year was changed from November 30 to June 30. The settlement of the county treasurers with the state was made as of June 30 instead of December 31, and the county treasurers were required to remit all state money monthly. The beginning of the appropriation year was changed from April 1 to July 1.

The legislature passed a new budget bill which provided for a centralized control of appropriations through quarterly estimates, approved by the governor. This corrected one of the weaknesses of most budget legislation. A governor assumed the responsibility, under most executive budgets, of recommending to the legislature the needs of all departments of the state, and the legislature, if they accepted the governor's recommendations, appropriated the requested amount. But there was no check on the departments to prevent their spending the whole amount during the first few months of the year or biennium and incurring deficiencies. Under the Nebraska budget law, the governor, through the approval of the quarterly estimates, is able to guarantee that the state departments, including the university state institutions, normal schools and all other activities, will run through the biennium without deficiencies.

Under this control, when the appropriations first became available, the governor sets aside ten per cent of all operation and maintenance appropriations as a reserve and allowed the departments to estimate for the first quarter from only ninety per cent of the total appropriation. At the end of each quarter one-eighth of the reserve is released to each expending agency to include in their quarterly estimates, as submitted to the Governor.

The budget law also provides that all expending agencies shall make monthly reports to the department of finance so that at the end of given periods all budgetary information relative to expenditures is compiled from these monthly reports, rather than from reports made by the expending agency at the end of the year or two-year period. The reports received from the departments show: First, the total expenditures for the month, and to date, against each appropriation, whether the same have been paid or not. Second, the expenditures actually paid by warrants, distributed to nine standard expenditure accounts and subdivisions thereof.

The system of centralized control of appropriations is working very satisfac-

torily. Having controlled the expenditures of all the agencies for six months of the biennium and studied the monthly reports and quarterly estimates filed by each expending agency, it was possible for the governor to call a special session of the legislature on January twenty-four and submit a detailed plan whereby the appropriations for the biennium could be reduced. The recommendations of the governor, relative to reducing appropriations, were followed with only a few minor changes and the appropriations were reduced $2,051,755.85, making possible a 33⅓% reduction in the state property tax levy for 1922 as compared with 1921. These reductions were made possible largely by the reduced prices of supplies and the reduction in salaries of new employes. The reductions did not affect the salary of anyone then employed.

TAX MEASURES IN OREGON

Taxation proposals to be voted upon in *Oregon* at the November election are thus summarized by Tax Commissioner Frank K. Lovell:

There are three measures to be voted upon by the people in November, and later there may be another.

The single tax measure proposes that for four years, beginning July 1, 1923, all taxation shall cease except a single tax on land; and after four years the single tax shall be levied in an amount sufficient to cover all governmental costs but in an excess amount sufficiently high to extract all the rental value of all lands, the excess proceeds to be used for whatever purposes the people may direct.

The state taxpayers' league income tax measure requires one-half of the tax levy for state expenses shall be levied each year, beginning with 1924, on net incomes of natural persons and corporations, the annual rate of income tax to be fixed by dividing the amount of the tax required by the total net amount of all incomes subject to such tax.

Exemptions are from $800 to $1,000 for unmarried persons; $1,000 to $1,500 for married and $200 for each dependent—life insurance, gifts, bequests, devises and inheritances, and charitable corporations and corporations exempted by United States income tax laws.

The Grange income tax measure levies graduated, annual taxes on incomes of all residents and all non-residents receiving incomes from sources within this State; corporations, joint stock companies and associations, on their net incomes not otherwise taxed hereunder; corporate bonds declared interests in corporations; natural persons to pay on net incomes of their business not otherwise taxed hereunder or exempt, except pensions, inheritances, insurance to amount of $10,000.00 not received during insured lifetime; making certain exemptions from personal incomes and exempting mutual savings, building and loan, religious, charitable, etc., associations; provides manner of enforcement; and appropriates $50,000 for expenses.

It is to be levied upon incomes received during year ending December 31, 1922, and annually thereafter.

The measure proposes to exempt $2,500 of income for married persons, and $1,500 for unmarried individuals, with an additional exemption of $400 for each child under eighteen, or other persons entirely dependent upon the taxpayer. The rate on the first $1,000 of taxable income is to be one per cent, with a steady progressive advance to a maximum of fifteen per cent on all incomes in excess of $50,000.

WISCONSIN TAX BULLETINS

The Wisconsin tax commission has recently issued Bulletin 14 of its series devoted to statistics and other data relative to the local tax system. This Bulletin contains a summary of assessments and general property taxes in villages for the year 1921, showing that there has been an increase in village taxes for 1921 of $349.800 over the amount levied for 1920. This increase is confined almost entirely to the levy for school taxes, the gain in this item alone being $298,000. As the result of the advance in the total assessed value, the actual tax rate, considering the villages of the state as a whole, decreased from .0277 in 1920 to .0275 in 1921. The total general property tax levied in villages was $6,329,000. This was distributed to the state, county, villages and schools on the following percentages: state, 6.8; country, 17.8; village, 31.2, and school, 44.1.

Bulletin No. 15 contains a statement of

all taxes raised for all purposes for the fiscal year ended June 30, 1921. The commission presents the following comments on the distribution of these taxes, the state and its local subdivisions:

"All general property taxes levied in the state for several years past may be roughly apportioned between the state and its municipal subdivisions in the ratio of 10% for state purposes, 20% for country purposes, and 70% for town, city, village, and school purposes. The net proceeds of the income tax are apportioned by statute on the same basis. The aggregate amount of taxes received by the state from these two sources during the year ended June 30, 1921, was as follows:

Property tax	$7,737,203
Income tax	468,100
Total	$8,205,303

"Bearing in mind that the entire cost of state government, including the University, Stout Institute, the nine normal schools, and all penal and reformatory institutions is charged to the state, it is not surprising that the entire amount required for these purposes exceeds the total figure shown above. Since the additional amount needed does not come from the general property and income taxes, which are the only ones the ordinary citizen pays, it is evident that he must look elsewhere for an explanation of high taxes. Moreover, the state regularly returns a large percentage of the general property and income taxes received by it to the local districts in the form of school, highway, and other kinds of aid. For example, durng the year in question, the state returned $5,523,920 as aid to the various local districts of the state out of the $8,205,303 paid to it in general property and income taxes, retaining only $2,681,383 for strictly state purposes. Of course, it required much more than this latter amount to meet the expenses of state government as above defined, and the additional revenue required was derived from taxes paid by railroad, express, telegraph, sleeping car, and insurance companies, and from the percentage of inheritance, street railway, and telephone taxes retained by the state.

"The total amount actually received by the state from all classes of taxes was $18,004,161, but the state returned $5,523, 920 of this amount to the local districts for state highway and other forms of local aid. If this amount be credited to the state, which merely collected it, and charged to the local districts which actually used it, we have a net balance of $12, 480,241 as the amount actually expended by the state. As nearly as the same can be expressed in terms of taxes, this amount represents the cost of state government to the people of the state for the year in question. It differs widely from the thirty or thirty-six million dollars cost of state government with which the newspapers regale us during legislative sessions, by footing up appropriations without eliminating duplications or agency transactions. The state receives some additional revenue from trust funds and departmental earnings, but the amount is not large and no part of it is derived from taxes.

"The net amount retained and used by the state represents 11.1% of the total as against 20.9% for counties, 37% for towns, cities and villages, and 31% for schools. While these figures vary slightly from year to year they fairly represent the cost of government to the taxpayers of the state and the distribution thereof among the different classes of municipalities mentioned."

TAX AMENDMENT ENJOINED IN OHIO

An injunction has been issued restraining the secretary of state from placing the taxation proposal on the ballot at the November election. This amendment was initiated by petition, but the court held that the petition had been filed one day late with the secretary of state. Other grounds for the order were found in the fact that some of the signatures had been written with indelible pencil, and in the court's acceptance of the contention that the abstract of the proposal was misleading in its failure to indicate the actual effect of the amendment if adopted. Anyone who thinks that the uniform rule is friendless in Ohio is apparently somewhat mistaken.

TAXATION OF TELEPHONE PROPERTIES

An address at the State Convention of North Dakota Telephone Association, June 8, 1922, by Charles C. Converse, Tax Commissioner of North Dakota

It is with somewhat of a feeling of trepidation that I come into the presence of experts, for I make no claim of being expert in the subject assigned to me for discussion. I do not know whether those who outlined the program for today had in mind a discussion merely of the method used in North Dakota for the taxation of telephone property, or whether a general discussion was desired of the subject as a whole. It would, doubtless, be of little interest to attempt to go into the various methods and theories of taxation in detail, but it may be of interest to advert to them briefly.

In discussing various methods of taxation and in indicating arguments for and against the several methods in use in the various states, I do not want to be understood as advocating or opposing any particular system. If I were possessed of settled convictions upon the subject, I would not hesitate to give expression to them, but in the absence of a settled preference, I prefer merely to suggest the lines of argument advanced by students of taxation for you to consider for what they are worth.

The law-making power finds itself obliged to choose from three possible methods of taxation. One is the tax upon the tangible property of the company, the method in use in this state. Another is a tax upon gross earnings; and still a third is a tax upon net earnings, or in other words an income tax.

I do not know that any state uses, exclusively, the net income tax as a method of taxing telephone properties. While most students of taxation agree that an income tax is a very proper part of a system of taxation, it is also a well-recognized fact that the fluctuating character of the revenue which comes to the state from the income tax makes it not dependable as the only source of revenue. The fiscal needs of the state and of municipal corporations are fairly constant and not ordinarily subject to sudden fluctuations, while on the other hand the revenue produced by the income tax is subject to sudden and extreme fluctuations.

A number of states impose a gross earnings tax upon the earnings of telephone companies. In some states, this gross earnings tax is a substitute for all other taxes upon telephone property, the tangible property of the company being entirely exempt from taxation. In other states, the tangible property is assessed and taxed, and this tax is supplemented by a gross earnings tax. You may be interested in a brief enumeration of a few of these states and some of the features of their tax laws.

Maine, for instance, has a gross earnings tax upon telephone companies which is in lieu of all other taxes, and this gross earnings tax is graduated. Thus small companies the earnings of which exceed $1,000 per year, but do not exceed $5,000 per year, are taxed at the rate of 1¼ per cent upon their gross earnings. If the earnings exceed $5,000 but do not exceed $10,000, the tax is 1½ per cent. If the receipts exceed $10,000 but not $20,000, the tax is 1¾ per cent. If the receipts exceed $20,000 but not $40,000, the tax is 2 per cent. Then for each additional $20,000, or fractional part thereof, of gross earnings the rate is increased one-fourth of one per cent, but never exceeds 6 per cent of the gross earnings.

Wisconsin, like Maine, has a graduated gross earnings tax, the minimum rate being 2½ per cent instead of 1¼ as in Maine, and the maximum in Wisconsin being 5 per cent instead of 6 per cent as in Maine.

California, instead of having a graduated tax has a flat tax upon gross earnings of 5½ per cent, which is in lieu of all taxes upon their real and personal property.

In Rhode Island, where the tax is also in lieu of all taxes upon personal property, the rate is 2 per cent of gross earnings, but real estate of telephone companies is subject to the general property tax. This is probably the lowest gross earnings tax,

except in those states where the gross earnings tax is supplemented by a general property tax.

In Minnesota, where the gross earnings tax is also in lieu of taxes on real and personal property, the rate is 4 per cent of the gross earnings of telephone companies, telephone companies being taxed less than railroad companies, which are taxed 5 per cent on gross earnings.

Connecticut has a 4 per cent gross earnings tax, but has a provision for taxing real estate locally and making a deduction from the gross earnings tax to compensate for the fact that such real estate is assessed locally.

A number of other states have a combination of a personal property tax and an excise tax, which is in the nature of a license tax upon the franchise or privilege of conducting the business. This franchise tax varies from three-eighths of one per cent in Louisiana to 2½ per cent in North Carolina upon gross earnings.

Enough has been said to indicate the great variation which exists in rates and methods of taxation in the several states. I should, perhaps, be making this discussion too long and tedious if I were to do more than merely enumerate some of the arguments for and against the gross earnings tax. One argument against the tax is that it is not based on ability to pay. Two companies may have the same gross earnings and yet one may be making money while the other may be losing money and have much difficulty in paying the tax. The reply to this argument which naturally suggests itself is that the general property tax is subject to the same objection. One company may be well able to pay the general property tax while another may not, just as one farmer may be making money while another may be losing money, and yet their tax bills may be the same.

A second objection is that any rate of taxation upon gross earnings which might be prescribed, is purely arbitrary, there being no formula which can be worked out to arrive at a just rate. This is doubtless true. Here again, the rejoinder is that nearly all tax rates are arbitrary. They are based upon the fiscal requirements of the government rather than upon ability to pay. About the only taxes which are based upon ability to pay are the income tax, the inheritance tax, and taxes upon luxuries.

The suggestion has also been made that a gross earnings tax might be imposed, supplemented by a net income tax, and the idea is advanced that in this way all the companies would be taxed through a small gross earnings tax, while the companies best able to bear the burden would bear the greater portion of it by reason of the fact that they would pay both the small gross earnings tax and also the net income tax. This is another method of attempting to arrive at the same result which is sought in those states in which the rate of the gross earnings tax is graduated, as in Maine and Wisconsin.

Those who advocate the gross earnings tax advance, as one of their arguments, the statement that telephone properties are exceedingly hard to value for the general property tax, which is very true. This argument, however, is countered with another to the effect that telephone property is no harder to value than manufacturing plants, for instance. Indeed, it is claimed that public utilities are easier to value than manufacturing plants, because their accounting is under governmental supervision. Again those who advocate the gross earnings tax advance as an argument in favor of it the fact that the general property tax is unsatisfactory because no two men would reach the same conclusion as to the value of a telephone property. The reply is that telephone property is no different from other property in this respect. No two men would arrive at the same conclusion as to the value of city real estate. This is, of course, a matter of common experience. I have seen, and no doubt you have seen witnesses under oath testifying regarding the value of city real estate who have differed more than 100 per cent in their estimates.

What I have said is sufficient to indicate the wide difference of opinion which exists among students of taxation and also to indicate some of the difficulties to be contended with in any system of taxation. There never has been, and I presume there never will be, a satisfactory system of taxation. Legislators may choose between various systems and may choose the one which is the less unsatisfactory. They may choose the one which is less unfair than the others. They may choose the one

which is less inaccurate. They may choose the one which is less difficult of administration than the others, but there is no system which is free from defects and, indeed, rather grave defects.

Having noticed the various methods of taxation to telephone properties which are in use, I come now to a brief discussion of some of the provisions of our laws in this state and the administration of those laws.

In the first place it is probably not necessary to mention the fact in this presence that telephone property is, by our law, put into class 1, which is assessed at 100 per cent of the full and true value thereof. You will all agree with me that telephone property is taxed too much. At least, I hope you will agree with me, and you will, perhaps, agree that all property is taxed too much. This naturally is true because we are spending too much. There may be a difference of opinion as to whether we are buying too much for the public, but at any rate, we are spending too much, and the amount we are paying at present prices makes our tax totals run up into stupendous amounts, and makes the tax burden a very great burden indeed.

May we expect a substantial reduction of taxes in the near future? The answer is to be found in the amounts of the levies being made by the governing boards of townships, school districts, counties and cities. The larger portion by far of our tax money is expended by these local units of government, or about 85 per cent of the total amount raised by taxation within the boundaries of our state.

We have no way of knowing, as yet, how the total of these levies this year will compare with those of recent years. We hope that the officials of each unit of government will find it possible to make some curtailment of expenditures so that the aggregate amount saved will be reflected in a substantial reduction of the tax burden. We must recognize, however, that these local boards are limited in their authority and in their opportunity to reduce expenditures. For instance, county commissioners find that most of the items of county expense are matters over which they have little or no control. About the only items with regard to which they do have fairly complete discretion are the appropriations for road and bridge purposes. We might expect a much more substantial reduction of taxes if we could be assured of a substantial reduction in price levels of the commodities which are purchased by the governments, state and local, and of the commodities which enter into the cost of living. In my judgment, such a general lowering of price levels is chiefly dependent upon further reductions of transportation charges. The most important single factor affecting the price of everything required by governmental units is the transportation bill. Because it affects the cost of living, it affects the wages which must be paid, the allowances which must be made for mother's pensions and similar items of expense. There is nothing the cost of which is not greatly influenced by transportation charges.

It is frequently stated by students of the subject that an increase in freight rates, when added to the price of merchandise, is multiplied by five in the process of being passed on through the complicated processes of commerce to the ultimate consumer. Thus, if freight rates are increased by one billion the burden of increase to the ultimate consumer is five billion. The transportation burden of the United States, as a whole, increased about 46 per cent from 1916 to 1920. The big increase in freight rates was operative during only a portion of the calendar year for 1920. The figures would be more impressive still for 1921, particularly if the comparison was on the basis of the cost per ton-mile. If it be true that such increases are multiplied by five by the time they reach the ultimate consumer, it will be seen of how very grave importance such increases are and what a powerful factor they must be in producing the increases in the expenditures of governments, state and local. The direct burden of railway transportation during 1920 for the United States as a whole was approximately $59.00 per capita as compared with a per-capita burden of taxation in North Dakota, including the 3c. per acre hail tax, of $49.45, and as compared with a tax burden for the United States government of $54.00 per capita. But as already indicated, to this direct burden of transportation, there must be added a large amount for the indirect burden on account of the increased cost prices caused by increased transportation charges.

You are doubtless all aware that the

valuation at which telephone property is assessed is determined by the state board of equalization. The valuation arrived at by the state board is based upon all the infomation they have at their command including, among other things, the reports which are made by telephone companies to the tax commissioner in which, as you know, a considerable amount of information is supplied concerning the physical characteristics of the telephone equipment as well as concerning the character and amount of business transacted. The assessment of telephone property by the state board of equalization for the present year will not be made until August, but it is to be assumed that the figures will not vary greatly from the valuations which were arrived at last year. Last year poles were divided into two classes, those of lines which were properly classified as toll lines and those of lines properly classified as farm lines. Then the poles of toll lines were again divided according to their physical characteristics into two classes, one of which was assessed at $240.00 per mile and the other was assessed at $160.00 per mile. The valuation placed upon the poles includes, of course, the value of cross-arms, brackets, guys, and insulators, and also includes the value of the right of way and franchise. The larger valuation of $240.00 per mile was assessed only against the main toll lines with the heaviest and most expensive equipment, all other toll lines falling into the second class at $160.00 per mile for poles. The poles used in farmers' lines were divided into three classes according to their physical characteristics and value. One class was assessed at $72 per mile, another at $54, and a third at $36 per mile, these, as well as the figures given for toll lines being for the poles, right of way and franchise.

The next subject of assessment is wire. Toll wire was divided into two classes. The copper wire was valued at $33 per mile and the iron wire at $12 per mile, the assessment against the wire of toll lines also including the value of the station equipment. The wire of farmers' lines was divided into three classes, copper wire being $33 per mile and iron being $12 per mile, both of these valuations including the value of the phones in the homes of subscribers. The third class is iron wire at $10 per mile which does not include the instruments, these being owned by the subscribers.

The next item of assessment is the exchanges. A lower value is naturally placed upon magneto exchanges than upon those operated by the central battery. In the taxation of exchanges, a still different method was used, for the valuation placed upon the exchanges includes the value of poll line and wire, cable or underground conduit, and central office equipment, private branch exchanges, and also all other property within the exchange, no separate assessment being made for any of these items. The magneto exchanges were divided into two classes. Those having not more than 100 phones were assessed at $36 per phone, while those having more than 100 phones were assessed at $42 per phone. Exchanges having the central battery system were also divided into two classes. Those having not more than 300 phones were assessed at $60 per phone, while those having more than 300 phones were assessed at $72 per phone, these figures, as I have already stated, including all the physical property of the exchange and pertaining thereto.

I have endeavored to indicate something of the method of arriving at the value of telephone property. These figures have been assessed by the state board of equalization but have been worked out very largely in the office of the tax commissioner. It will not be contended by anyone that these figures are absolutely accurate or absolutely just. All persons concerned with taxation must realize that there is no such thing as a system of assessment which is absolutely accurate or just. The most that can be claimed for any system is that it is the nearest approximation to accuracy and justice which can be worked out without a prohibitive burden of expense in arriving at the valuation. For instance, a value might be placed upon telephone property by skilled appraisers just as is done by the farm loan department, as to farm lands, but the burden of expense which such a practice would entail renders it prohibitive and makes it necessary to resort to another method less scientific, less accurate and less just, but also less expensive. Anyone can readily understand that it is impossible for a board of equalization sitting at the capitol to arrive at an entirely accurate

and fair valuation. The attempt is made, however, and will be made to place before them as detailed and complete a description of the various telephone properties as can be obtained by the methods available so that they may have as good an opportunity as can be afforded them of reaching a correct conclusion; and we will always be glad of any information which will enable us to place before the board of equalization any additional details or any more complete, accurate and reliable information than it has thus far been possible to give them.

You know, of course, that the telephone property is apportioned among the various counties by the tax commissioner and then is again apportioned in the respective counties between the various assessment districts by the county auditor. Mistakes frequently occur in the apportionment of this property due to the fact that the reporting officer of a telephone company fails to make the correct apportionment himself. I do not know of any way that this can be avoided except by the exercise of greater care in the selection of the officials of telephone companies and by the exercise of greater care on the part of those who are selected. Assessment and apportionment are at the very foundation of an equitable system of taxation. The hardest thing in all the administration of the general property tax, whether upon telephones or upon farm personal property or any other kind of property, is to arrive at a correct assessed valuation. It is work which should require the services of experts, but in practice this work is often delegated to men who are very inexpert. It frequently happens that it is not the most expert man in the township who is elected as assessor, but it is the man who has the time and is willing to take the office. He may be well informed and a man of good judgment or he may not, but, whether he is or not, in most cases he has made no special preparation for the work. Local assessors do not, of course, have anything to do with the assessment of telephone property, and so these remarks may be a little off the subject, but they are said merely by way of illustrating the difficulty of getting a correct assessment under any system of administration. The inaccuracies in assessment of telephone property are probably no greater than in the assessment of many other kinds of property.

DECISIONS AND RULINGS

EDITED BY A. E. HOLCOMB

Income, Federal — Rights to Subscribe — Determination of Income on Sale. — The Supreme Court has settled the question of the application of the income tax law to the sale of rights to subscribe for new shares, sustaining the lower court's ruling against the contention of the government that the entire proceeds of such sale was taxable as income. It holds that not all of such proceeds are taxable but that in essence the transaction is similar to the sale of shares received as a stock dividend, an apportionment being appropriate, based upon the cost of the original shares, taking into consideration payments required of the purchaser upon taking up the rights purchased through subscription.

In the case in question the company doubled its capital stock and offered the new stock to its stockholders, share for share, upon payment of $150 for each new share subscribed. It was stipulated that the value of each share when acquired (such acquisition being in this case in the same year of the issuance of the rights) was $710 and the determination of the taxable gain as computed by the district court was as follows: It added these amounts together, making $860, representing two shares, or $430 per share. The rights were sold at $358.48 per share. The purchaser being required to pay $150 upon subscriptions, which was held equivalent to a sale of fully paid shares at $508.48 each, which compared with the cost to the seller of $430, produced a gain to him of $78.48 per share, (273 Fed. 822).

This method was held on the whole to lead to a correct result and the judgment was affirmed.

The opinion contains interesting discus-

sions of the effect of the transaction and of the various contentions of the government in its effort to uphold its claim that the entire proceeds of the sale were taxable as income, but the decision is based essentially upon the principles heretofore announced in the decisions dealing with stock dividends and with the sale of capital assets. Suggestions as to what would have been the effect upon the seller of the rights if the purchaser had not taken up his rights but had allowed them to lapse, or if the original shares had been bought at different dates and at different amounts, were held to be of only speculative interest, not affecting the soundness of the method employed in the case under review. —*Miles* v. *Safe Deposit & Trust Co. of Maryland,* U. S. Sup. Ct., May 29, 1922. See *Bul.* VII, p. 53.

Income, Federal—Liability of Purchaser of Stock for Back Taxes.—While an Arkansas corporation was liable to a federal income tax one of the stockholders purchased the stock of all of the other stockholders, thus, under the laws of the state, dissolving the corporation. As the tax under the federal statutes had become a lien against the corporation at the time of the sale, the sole stockholder paid such tax and commenced equity proceedings to compel the other stockholders to contribute their share. It appeared that at the consummation of the sale the parties overlooked the tax liability. The court refused to grant relief as there was no mutual mistake arising from a misapprehension of the facts.—*Quinn* v. *McLendon,* 238 S. W. 32.

Income, Federal—Foreign Corporation — Income from Sources in the United States. — A sum paid by a domestic corporation to a corporation organized under the laws of the Republic of Cuba, as liquidated damages for the breach of a contract to transport coal from the United States to foreign countries, which amount was equivalent to the amount of profit the Cuban corporation would have realized had there been no breach by the domestic corporation, is subject to tax as income derived from sources within the United States by the foreign corporation. — *Opinion of Attorney General,* July 13, 1922.

Income, Federal — Estate Tax Not Deductible from Taxable Income of Decedent Prior to Death.—Under the Act of 1916, an individual taxpayer and his estate after death are separate entities, and section 5, permitting deductions from income of taxes paid to the United States, does not authorize an executor to deduct the amount of estate tax from the taxable income of decedent for the part year prior to his death. — *Catherwood* v. *U. S.*, 280 Fed. 241.

Operating Expenses — Federal Income Taxes. — The observations of Mr. Justice Brandeis in the *Galveston Electric Co.* case, decided April 10, 1922, and quoted in the note of that case contained in the May *Bulletin,* p. 260, have received the interpretation there expressed, by the district court—three judges sitting.

An injunction was sought to prevent the application of reduced rates for telephone service, ordered by the Public Service Commission. One of the contentions of defendants was that the U. S. income tax should not be considered a deduction in arriving at net earnings. The court dismissed this contention in the following brief but conclusive statement:

" We note as matters debated at bar the following: (A) The deductibility from gross income of the so-called U. S. Income Tax is established by *Galveston etc. Co.* v. *Galveston* (U. S. S. C., April 10, 1922)."

This feature of the case is thereafter in the opinion treated as disposed of.—*N. Y. Telephone Co.* v. *Public Service Commission et al.,* U. S. D. C. So. Dist. N. Y., May 23, 1922.

Income, Federal—Deductions—Business Expenses.—A taxpayer engaged in business as a horse breeder and stock raiser may deduct as business expenses amounts spent in caring for, feeding, breeding and marketing blooded horses and for transportation charges in taking the horses to various racing centers. The fact that the taxpayer is a sportsman, in the sense that he is fond of racing horses, does not change the character of the undertaking, if he is engaged in business for profit.

In determining the deductibility of certain business expenses, where the undis-

puted proof leaves only the question of whether the taxpayer is or is not engaged in business as a horse breeder and stock raiser within the meaning of the taxing act, such question is one of law for the court and not a question of fact for the jury. — *Wilson* v. *Eisner,* U. S. C. C. A. N. Y.

Federal Tax on Transportation—Demurrage. — Demurrage is a terminal charge—a part of the charge for transportation—and, conceding that its purpose is primarily to prevent the detention of cars, is also to be regarded as a part of the charge of transportation. The demurrage charge is a proper one, whether it be regarded as, or as relating to, facilities of shipment, services in connection with the delivery of goods, or the storage or handling of the same.—*The Proctor & Gamble Co.* v. *U. S.; The Buckeye Cotton Oil Co.* v. *U. S.,* U. S. D. C., Ohio.

Capital Stock, Federal — Basis of Valuation.—The federal excise tax law of 1916, imposing a tax based upon capital stock has received an interpretation which is equally applicable to the subsequent acts of 1918 and 1921, and settles a point not heretofore before the courts.

The plaintiff corporation contended that the words "capital stock" as used in the act meant the net worth of the assets as determined from the books; that this interpretation was indicated by the reference to the surplus and undivided profits as to be "included", in computing the value. The government contended that the words carried a broader meaning and authorized an estimate, taking into consideration all elements, including the market value of the shares, the earning power, franchises, good will, etc.

The court upheld the contention of the government, holding that the words "capital stock" were to be construed by the character of the particular tax, the language used and the context. The language used in this act was held to contemplate an estimation or an appraisal of the stock by an exercise of judgment, taking into account all factors, rather than an auditor's exact determination of the value of the net worth, taken from the books of account, which would not be an "estimation", but would be the exact value, rather than the fair value; that furthermore it would have been made determinable as of the end of a fiscal year, rather than the fair average value for the preceding year.

The court held that the purpose of including the reference to surplus and undivided profits was not to restrict the estimation but to require a consideration of these items as well as all other pertinent items.

The action taken in Congress when the Senate receded in conference from its amendment providing for the use of the book net worth, was referred to as persuasive that the words "fair average value of the capital stock" were not thought by Congress to be synonymous with the net worth as shown by the corporate books.

The conclusion was that the government had the right to look to the net worth of the corporate assets, including the surplus and undivided profits, as shown by the books; also to the franchises, good-will, contracts, earning capacity and the market value of the share stock, over the preceding year, thus arriving at a value according to its best judgment, by which the tax was to be measured. — *Cent. Union Trust Co.* v. *Edwards,* U. S. D. C., So. Dist., N. Y., May 25, 1922.

Capital Stock, Federal—Massachusetts Trusts as "Associations".—The status of the Massachusetts trusts under the various federal tax laws has often been the subject of judicial scrutiny, frequently resulting in exempting them from the operation of such laws. A contrary result is indicated by a recent decision of the circuit court of appeals, reversing the district court.

In this case four separate trusts were involved, the opinion covering all four cases. Three of the trusts were engaged in owning, managing and leasing real estate and denied that they were "associations" within the capital stock tax law. The fourth trust, a large manufacturing concern, admitted that it was an "association" but denied liability for the tax on the ground that it had no "capital stock" within the meaning of the law.

The cases arose under the laws of 1916 and 1918 and the court held that both acts were similar, so far as these cases were concerned.

The court reviewed the legislation imposing excise taxes on corporations, beginning with the act of 1909, which based the tax on net income, under which act the Supreme Court had held in *Eliot* v. *Freeman,* 220 U. S. 178, that two typical trusts were not taxable, and the question was whether the later acts under review were to be given the same interpretation.

The decisive point was held to be that these acts imposed the tax upon associations organized *in* the United States, whereas the earlier act applied to those organized *"under the laws of the United States or of any state."* This change in language the court held to indicate a deliberate intent of Congress to avoid the decision above noted and to subject to the tax associations organized in the United States, whether formed under a statute or not. Upon discussion of the details of the trusts the court held them clearly "associations" within the meaning of the statute.

As to the claim of the trust that it was not taxable because having no capital stock, its shares being without par value, the court refused to take such a view, which it characterized as narrow and technical, holding that in every practical way the trust was exercising a privilege precisely the same as a corporation, and employing capital stock represented by shares.

In each case the judgment of the district court was reversed and the trusts held liable for the taxes.—*Malley* v. *Howard; Casey* v. *Howard; Malley* v. *Crocker; Malley* v. *Hecht,* 281 Fed. 363.

Excise, Federal — Bankers' Special Taxes—Act of 1898.—A corporation engaged in banking and surety and fidelity business and also engaged in renting safe deposit vaults and in acting as trustee under corporation bond issues, was assessed for special tax on bankers under the act of 1898, for the years 1898 to 1901. The taxes were paid and the company applied for refund in 1913, pursuant to the act of 1912, alleging that none of its capital had been used in its banking business. The application was rejected in 1917 and suit for recovery was begun in 1918.

The court of claims dismissed the suit on the ground that as the cause of action accrued six months after presentation of the claim, the two-year limitation expired prior to the bringing of suit, on the authority of *Union Trust Co.* v. *U. S.,* 55 Ct. Cls. 424, and *Kahn* v. *U. S.,* 55 Ct. Cls. 271.

The court reversed this, following its holding in *Sage* v. *U. S.,* 250 U. S. 33, 39, that the six-year statute of limitations applied to cases arising under the act of 1912, c. 256.

On the merits, the court rejected the contention of the government that, as matter of law, all of the capital and surplus of a banker was taxable because available for use in the banking department, although none of it might have been actually so used; that the act fixed the tax upon the banker who used or employed a capital. It held that the act should not be so construed; that it contemplated that not all of the capital might be used in the banking business and that an apportionment was proper.

A motion to remand, for the purpose of securing a finding of additional facts as to the use of the company's capital and surplus in its various departments, had been seasonably made and the court held that as it could not say from the facts found, that all the capital was used in the banking business, or that none was so used, or whether an amount equal to the assessment was so used, additional findings were necessary, and remanded the case, with directions to make such findings.—*Fidelity & Deposit Co. of Md.* v. *U. S.,* U. S. Sup. Ct., May 29, 1922.

In a similar case the corporation was carrying on five classes of business, but these businesses and the assets of the several departments were not separated, as was done in the case above noted. For this reason, it was held that the company had utterly failed to sustain the burden of establishing that none of its capital or less than the amount for which it was assessed had been used or employed in its banking department, and as no request for findings had been made, to determine an apportionment, the court of claims properly denied recovery unless as matter of law, taxes had been improperly assessed upon undivided profits as capital. Upon a consideration of this question, the court held that Congress did not intend to make a

distinction between technical "surplus" and "undivided profits"; that the latter term should be construed as surplus and this was taxable under the act, which provided that "in estimating capital, surplus should be included," and as there was no finding that such undivided profits were not used in the banking department, this ground did not avail the company and the judgment of the lower court in favor of the government was affirmed. — *Fidelity Title & Trust Co. of Pittsburgh* v. *U. S.*, U. S. Sup. Ct., May 29, 1922.

Excise Tax—"Manufacturer". — A corporation engaged in the business of buying and slaughtering of live stock, and the buying of meats for curing, rehandling, packing, and manufacturing into all forms known to commerce, expects to make a profit by changing or adding property after its purchase, and hence is a "manufacturer" within the Tennessee law requiring manufacturers to pay a tax.— *Neuhoff Packing Co.* v. *Sharpe et al.*, 240 S. W. 1101.

Excise, Federal—Sales by Manufacturer—Candy. — Congress intended that various compounds of sugar and other ingredients, practically all of which are also food ingredients, should, when compounded, sold and consumed as candy—a luxury — be subjected to tax. Taxing sweet chocolate, when put up and sold in such form as to indicate that it is to be consumed as candy and exempting from tax such sweet chocolate, when it is obvious from the packing or other circumstances surrounding the transaction, that it is to be used merely as an ingredient for further manufacture constitutes a sound distinction and basis of tax. The question of what proportion of the sweet chocolate involved is used for cooking or domestic purposes is a question of fact for the jury.

The burden of proof is on the plaintiff to show that the taxes collected were illegal or the assessments excessive, and it is held, in the instant case, that plaintiff was not entitled to recover more than the amount that it could show it paid as a tax on such portions of the sweet chocolate as were not sold and used as candy within the meaning of the department's regulations. — *Malley* v. *Walter Baker & Co., Ltd.*, 281 Fed. 41.

Excise, Federal — Bankers' Special Tax.—A company which was incorporated to carry on a general trust and financial business and also to receive money on deposit and pay interest thereon and to loan money upon such securities as it might approve, carried on a general trust business but received deposits subject to check and made loans secured by collateral. Held, the company had some capital employed in the banking business which was subject to the banker's special tax imposed by the Act of Oct. 22, 1914. The amount of capital used in the banking business should be measured, at least in the absence of a more satisfactory method, by the ratio which the assets employed in the banking business bear to the assets employed in the aggregate business.—*Mayes* v. *United States Trust Co.*, 280 Fed. 25.

Federal Tax on Messages — Exchange of Services — Liability as between Companies. — A telegraph company and a railroad company entered into a contract for the mutual exchange of services. Under the provisions of Regs. 57, Art. 9, the telegraph messages are held subject to tax, computed upon the amount of the regular established charge for the transmission of similar messages for ordinary customers, calculated at the regular fixed rate provided in the tariffs of the transmitting carrier. The tax was paid to the Government and the companies endeavor by friendly suit to test the validity of the regulations, the Government not being made a party to the suit. The court held that the taxes having been paid, the validity of the tax should be raised by a proceeding to recover the taxes back, and that the parties to the suit before the court could not arrange to test the validity of the regulations in a manner convenient to themselves.

The court further held that no sound basis for differentiation could be made between exchanges and cash-paid services; that while there might be some difficulty in working out the valuation to be placed upon messages transmitted under exchange service agreements, nevertheless the commissioner was empowered to issue regulations necessary and proper to carry into effect the general provisions of the law, and the regulations promulgated seemed to comport with the general tenor of the act.

The tax having been paid under color of law, as between the parties before the court, it was held that it should be borne by the railroad company.—*Western Union Telegraph Co.* v. *The Delaware, Lackawanna & Western R. R. Co.,* U. S. D. C., N. Y.

Excise, Federal — Insurance Policies.—A mutual association, not operating under the lodge system, and whose membership is not confined to any one locality, which insures the lives of its members, making assessments when losses occur, sufficient to meet such losses and pay the expenses of maintaining the association, but providing for no dividends or profits, is held subject to tax on its policies or certificates, under the War Revenue Act.

A policy issued by such association, insuring the life of a member for $100 and accumulations, the amount being increased after six months at the rate of $12.50 per month until it reaches $1,000, provided the amount collected on assessments made on a specified "circle" of 1,000 members is sufficient, and all liability being contingent on continued payments of assessments by the insured, is held subject to tax on the amount of the association's liability thereon at the time the tax is assessed. — *Bankers' & Planters' Mut. Ins. Ass'n v. Walker,* 279 Fed. 53.

Inheritance, Federal — When Tax Due and Enforcible.—Collection of the estate tax imposed by the 1918 Revenue Act may not be restrained where the collector, acting under color of law and under authority of the commissioner of internal revenue, attempts to collect after one year from decedent's death but before one year and 180 days have elapsed. The extension of 180 days must have been definitely granted by the commissioner and unless so granted the tax is due and collectible after one year from decedent's death.—*Page* v. *Polk,* U. S. C. C. A., R. I., May 16, 1922; reversing 276 Fed. 128.

Inheritance, Federal—Deduction of State Taxes. — The inheritance tax of Utah is a tax against the estate, as distinguished from a tax against the inheritance, and amounts paid thereunder are deductible from the gross estate in computing the amount of the federal estate tax.—*Kearns* v. *Dunbar,* U. S. D. C., Utah.

Inheritance, State — Interest on Delayed Payment.—The provision of the Washington Act imposing interest upon an inheritance tax not paid within fifteen months after donor's death, except where the delay was caused by litigation necessary to determine the amount of the tax, was held to include litigation to determine whether the estate was or was not taxable and not so construed as to impose a greater payment when the litigation concerning the tax was of one sort than when it was of another.

A trustee must resist claims against a trust estate which may be unlawful, and his resistance of the state's claim for an inheritance tax, where he acted in good faith, and there was reasonable ground for his act, although finally unsuccessful, was held not unnecessary, under the provision relieving from interest where delay was caused by necessary litigation.—*In re Duncan's Estate,* 206 Pac. 1.

Inheritance, State—Charitable Exemptions. — Under the New York Act, exempting from the transfer tax property given to a charitable corporation, a gift to a corporation, which is to be formed in the future by the executors, to conduct a home for needy children, is exempt, there being no reason to limit the exemption to existing corporations. — *In re Le Fevre's Estate,* 135 N. E. 203.

Inheritance, State — Transfer Tax on Contingent Beneficial Interest.— Construing the Missouri Act of 1917, the court holds that there is no material difference between a transfer of property and succession to property, since there cannot be a transfer without succession, and there may be both under a will or by trust created by will, though the transferees, under certain contingencies specified, are not then *in esse,* so that a transfer tax can be levied upon contingent beneficial interests under a testamentary trust.

If the provision of section 1, that the tax shall be imposed when a person actually comes into possession and enjoyment of the property, is inconsistent with section 25, specifically providing that when the property is transferred in trust, con-

tingent interests shall be assessed at the highest rate which would be payable under any of the contingencies, the later section controls, under the rule that it is the latest expression of the legislature.

The provision that the tax on contingent beneficial interests in a trust shall be paid immediately at the highest rate chargeable under any of the contingencies specified, with provision for refunds if it is later ascertained that a lower rate should have been charged, was within the power of the legislature to enact. It does not levy a tax on property.—*In re Kinsella's Estate; State Treasurer* v. *Mercantile Trust Co. et al.,* 239 S. W. 818.

INHERITANCE, STATE—A GIFT IN CONTEMPLATION OF DEATH, COMPLETE BEFORE PASSAGE OF ACT, NOT TAXABLE. — The Pennsylvania Act, June 20, 1919, enlarging the class of taxable gifts to include those made in contemplation of death, contained nothing to indicate that it was intended to be retroactive and such a gift, fully accomplished before passage of the act, is not taxable.

The act as amended, clearly shows a settled policy of making each gift liable only for its succession tax, and the tax on a gift made in contemplation of death cannot be considered charged on the whole estate, and enforceable, by denying any distribution until it is paid, where the gift was fully accomplished before passage of the act.—*In re Oliver's Estate,* 117 Atl. 81.

INHERITANCE, STATE—NON-RESIDENT. —A non-resident decedent's claim against her husband's administrator for her interest in his estate was held not subject to tax.—*In re Scully's Estate,* 194 N. Y. Supp. 351.

INHERITANCE, STATE — OUTLAWED NOTES OF LEGATEES—GIFTS INTER VIVOS. —Outlawed notes of legatees to testatrix were held not subject to tax.

A *bona fide* transfer between the living was held not subject to tax, notwithstanding an agreement that they were to be considered advancements.—*In re Mead's Estate,* 194 N. Y. Supp. 349.

INHERITANCE, STATE — RETROACTIVE LAW. — The South Carolina Court held that the 1922 inheritance tax law was prospective, hence the estate of a testator who died about a year before the enactment of the act, was not subject to the tax, even though it was in process of settlement at the time of its enactment.—*Belser* v. *South Carolina Tax Commission,* 112 S. E. 261.

INHERITANCE, STATE—ESTATE BY ENTIRETY. — The New York court held that in an estate by the entirety, each of the tenants owns the whole; that there is no actual transfer to the surviving tenant and that the tax is on the right to the immediate ownership of the property, which the statute provides shall be deemed a "transfer" and be taxable as though the whole property belonged absolutely to the deceased tenant, and had been bequeathed to the surviving tenant. In fixing the amount of the tax, from the value of the property owned by the decedent at the time of his death there must be deducted the value of widow's dower before the tax is assessed. —*In re Dunn's Estate,* 193 N. Y. Supp. 919.

INHERITANCE, STATE — PRORATING DEBTS OF NON-RESIDENT DECEDENT.— The rule for prorating debts of non-resident testator to creditors of the state, for purpose of transfer tax stated.—*In re Fearing's Estate,* 194 N. Y. Supp. 76.

INHERITANCE, STATE—CHARITABLE EXEMPTIONS.—It was held in New York that a corporation formed to carry out a testamentary provision creating a trust fund, to be used for the erection of an apartment building, to be conducted solely for the purpose of "providing unmarried working women with homes and wholesome food at a small cost to them and in deserving cases without cost," is one solely for charitable and benevolent purposes, and such of its real property as is held exclusively for such purposes is exempt from taxation. On a claim for exemption from taxation the corporation need not show that the recipients of its charity are persons in need of assistance and proven objects of charity, as to so restrict the meaning of the word "benevolent", as used in the law, would be contrary to legislative intent and public policy.—*Webster Apartments* v. *City of New York,* 193 N. Y. Supp. 650.

Inheritance, State—Joint Bank Account.—Where bank accounts standing in the joint names of decedent and another, payable to either, were created or added to after May 20, 1915, and it satisfactorily appeared that all the moneys so deposited were the sole property of the survivor, the accounts were held not subject to a transfer tax, under the New York law.—*In re Van Deusen's Estate,* 193 N. Y. Supp. 762.

Inheritance, State—"Family" Corporation—Record Owner of Shares—Assignment of Right to Estate.—Where a father organized a corporation, transferred his real estate to it in payment for stock, divided most of the stock between his children, and indorsed certificates of stock to the corporation, but remained the owner of record of the stock, received the dividends, and thereafter sold some of the stock to other persons, without consent, the stock not so sold to such other persons on the father's death was held subject to the Utah inheritance tax law, the enjoyment and beneficial interest of the stock having remained in the father during his lifetime.

Where the father, who was his daughter's sole heir, pursuant to a request made by daughter prior to her death, assigned all his right, title, and interest in and to the daughter's estate to a son, without consideration, prior to the appointment of an administrator and without reducing the property to possession and without having had his title therein affirmed by a decree of a court, the property was held not subject to inheritance tax on the father's death within three years thereafter, the property at no time having been a part of the father's estate.

Where the father assigned stock of other corporations to the corporation so organized, which was subsequently distributed to the children in the form of dividends, the stock so distributed was held not subject to inheritance tax upon the father's death, the chldren not being parties to the proceeding. — *In re Romney's Estate,* 207 Pac. 139.

Inheritance, State—"Discovery", in Aid of Collection.—In a Louisiana case it was held that the state could compel the heirs to return a descriptive list of the property left by the deceased, even though it appeared that he had transferred all of his property more than ninety days previous to his death. The heirs based their refusal to furnish the list upon the provision that only donations or transfers of property for inadequate consideration made within ninety days of the death of the owner were to be presumed to have been made in avoidance of the inheritance tax and to be subject to the tax, unless the presumption was overcome by sufficient evidence. The court compelled the filing of the list and held that the effect of the statute invoked by the heirs was to establish a presumption with respect to transfers within the ninety-day period and did not deprive the state of the right to collect the tax upon property transferred in avoidance of the tax even though made more than ninety days before death.—*Succession of Vatter,* 91 So. 60.

Inheritance, State — Interest on Delayed Payment.—Under the New Jersey Act the executor was held not required to pay interest, where delay in payment was due to delay in assessment, not attributable to him. Payment of 5 per cent of the tax to secure waiver for transfer of shares, in advance of levying the tax, was held such payment as to affect discount and interest.—*In re Vail's Estate,* 117 Atl. 143.

Inheritance, State—Tax as "Debt". —In a Mississippi inheritance tax case the state brought proceedings under general statutes, to discover the amount of a decedent's estate and sought to justify such proceedings on the theory that the tax imposed under the inheritance tax act was a debt which under existing general statutes might be ascertained and collected by action in the courts. The court refused to entertain the proceedings, on the ground that the statutes making taxes a debt had no application to the recovery of inheritance taxes and that the method of assessing and collecting inheritance taxes provided for in the statute creating such taxes was exclusive and must be followed.—*Enochs* v. *State,* 91 So. 20.

Inheritance, State — Gifts in Contemplation of Death.—A South Dakota decedent a few months before his death conveyed parcels of land to his several

children and on the same day executed his will. The state claimed that the conveyances were made in contemplation of death and were subject to the inheritance tax. The evidence showed that the decedent, about 10 years previous to his death, when he realized that he was unable to continue work on his land because of illness, called his sons and daughters together and stated to them that if they would stay at home with him and work on the farm he would acquire and convey to each of them a quarter of land. This arrangement was carried out by the decedent and his children. It did not appear that decedent was in danger of death when the arrangement was made or when he made the conveyances in question. The court held that the deeds were not executed in contemplation of death.—*In re Kuetter's Estate,* 187 N. W. 625.

Inheritance, State—"Absentee" as "Deceased Person".—A proceeding was brought in the Iowa courts for the administration of the estate of a person who had disappeared from the state and from whom nothing had been heard for seventeen years. The state claimed that the estate was subject to the collateral inheritance tax. The court held that the statute imposing the inheritance tax refers only to the estates of deceased persons and makes no mention of the estates of absentees, hence as the legislature had not seen fit to extend the inheritance tax statute to include absentees' estates, the court would not do so. — *In re Kite's Estate,* 187 N. W. 585.

Inheritance, State—Trust Fund.—In a Pennsylvania case the court held that under the direct inheritance tax act of that state, an inheritance tax could not be assessed against the executor on the corpus of a trust fund created by a testator's trust deed, in proceedings to which neither the trustee nor persons possessed of a legal or equitable interest therein were before the court.—*In re Dick's Estate,* 116 Atl. 549.

Inheritance, State — Resident and Non-Resident Decedent—"Residence". —It was held in Kentucky that where decedent was a resident of the state at the time of his death, the inheritance tax should be paid out of the entire estate left by him, subject to such exemptions as are allowed by the statute and where the legal residence of decedent was not in the state, only such part of the estate as then had a situs within the state and would descend under its laws would be subject to the inheritance tax, and only to the extent its value might exceed the exemptions allowed by the statute.

The word "residence" as used in the inheritance tax statute is synonymous with domicile, and residence is to be determined by applying the principles relating to domicile. — *Staiar's Adm'r et al.* v. *Comonwealth,* 239 S. W. 40.

Inheritance, State — Non-Resident —Intangibles. — The New York court held that warrants to subscribe for shares in a banking company should not be included in the estate of a non-resident, for purpose of assessing the tax; that funeral expenses contracted in the state should be deducted in full from New York assets.—*In re Phelps' Estate,* 193 N. Y. Supp. 399.

Inheritance, State—Stock in Interstate Railroad. — In New York the tax on stock in a consolidated railroad corporation should be based on the portion of value that the mileage in the state bears to the total mileage.—*In re Ripka's Estate,* 193 N. Y. Supp. 398.

Inheritance, State—Estates by Entireties.—The New York tax is not a tax upon property but a tax upon the privilege of succession, under certain defined circumstances, and an estate by the entirety vested in a man and wife in 1910 is not taxable under the act as amended subsequent to that date. This amendment is not retroactive, and under the former statute there was no transfer tax on the death of one of the owners of an estate by an entirety, the survivor being held the representative of the single ownership.—*Estate of Edmund Lyon,* N. Y. Sup. Ct., App. Div., Apr. 18, 1922.

Inheritance, State—Trust Estate—Retroactive Act. — Under the Connecticut act relating to succession taxes, the act in force when a deed and security were delivered to a trustee was held to apply rather than the act which came into

effect after the creation of the trust, the trust deed being irrevocable, and the possible contingency on which the fund might revert to the settlor being beyond the settlor's control, she having retained nothing beyond the income thereof during her life.

An irrevocable grant of a remainder interest is a present transfer to the remainderman, and since a succession tax is a tax on the transfer, and not on the property, the question whether any particular transfer is or is not taxable should logically depend upon the terms of the statute in force at the time the transfer takes place.

Any legislative intent to lay a retroactive succession tax ought to be manifested by plain and explicit words, and the act in question contains no expression of such an intent.

Since the taxing power of the General Assembly, within constitutional limitations, is plenary, it must be assumed that variations in the phraseology of the different tax laws were intentional and adapted to the changing financial necessities of the state.

The phrase "gift to take effect at death," means a gift in the future, to take effect at death, of an interest in property possessed by decedent at the time of his death, and the act does not lay a tax upon a gift of the remainder interest in property of which the decedent reserved no more than a life interest, which was extinguished by her death.

Under the rule that the enumeration of subjects of taxation excludes what is not enumerated, the use of the phrase "testamentary gift" as synonymous with "gift to take effect at death" seems to exclude rather than include irrevocable conveyances which had already taken effect by delivery before grantor's death.—*Blodgett* v. *Union & New Haven Trust Co.,* 116 Atl. 908.

CORPORATION INCOME—CONSTRUCTION OF MASSACHUSETTS ACT AS TO INCOME OF FOREIGN CORPORATION FROM INTERSTATE COMMERCE.—As the act provides for the deduction of income from business carried on outside the state, income from property outside the state, and income from interstate or foreign commerce, and for the apportionment of the income in proportion to property owned within and without the state, the income of a foreign corporation from interstate commerce was properly deducted before apportioning the income in proportion to the property owned within the state, and the other deductions are not affected by the statutory method of determining the amount of this first deduction.

The net income from sales in interstate commerce is to be treated as received from interstate commerce, though the goods are manufactured within the state, there being no actual profit therefrom until sale, and the statute proviidng no adequate machinery for separating the income attributable to the intrastate manufacture from that attributable to the interstate sale.—*Eaton Crane & Pike Co.* v. *Commonwealth; U. S. Envelope Co.* v. *Same,* 135 N. E. 170.

EQUALITY—RAILROAD PROPERTY—DISCRIMINATION.—The federal district court sustained the 1921 assessment of the Chicago and Northwestern Railway in the State of South Dakota, dismissing the complaint on the merits and dissolving the preliminary injunction.

The court first considered the motion of defendant, the Tax Commission, to dismiss the bill for want of jurisdiction, upon the claim that an adequate remedy at law existed. This motion was denied, the court holding that the statutory requirements to give jurisdiction being present, the necessity of paying the taxes assessed and bringing suits in numerous counties was sufficient ground to sustain the proceeding in equity. *Taylor* v. *L. & N. Ry. Co.,* 88 Fed. 350. It further held that the "adequate remedy at law" must exist in the federal courts, in order to prevent jurisdiction in equity and also that the allegations of denial of due process and equal protection presented a federal question, giving jurisdiction. *L. & N. Ry.* v. *Bosworth,* 209 Fed. 403; *Davis* v. *Wallace,* U. S., Jan. 9, 1922.

Coming to the merits, the court stated the controversy to involve the two questions of systematic undervaluation of property other than that of plaintiff and wilful and arbitrary overvaluation of plaintiff's property.

In discussing the first question, the court commented upon the evidence submitted as to the assessment of agricultural lands which consisted of a compilation of land sales, using the consideration shown in the deeds and by the revenue stamps, observ-

ing that such evidence was of doubtful competency, because there was no showing as to the circumstances of the sales used, whether they were for cash or on time or the rate of interest on deferred payments; whether the sales were pursuant to contracts made in 1919 and 1920, at the inflated values then prevailing; whether the transfers were merely deeding back lands where purchasers had defaulted. Also there was no showing as to court sales, whether they were foreclosure sales, bid in by the mortgagee and finally there was no evidence as to whether the sales made were deemed the actual values of the lands by the parties. Under all these circumstances, the court found little evidence to impugn the good faith of the Tax Commission which was brought in question, and in support of this conclusion reviewed the efforts of that commission since its organization in 1913, to bring about the assessment of land at its full value, as required by the constitution and the laws of the state. This review showed that the first assessment in 1913 was $764,808,016, being an increase of nearly 250 per cent over the 1912 assessment; that in the succeeding years the total was increased annually, reaching in 1920 the sum of $1,547,865,238. In 1921 the aggregate showed a reduction to $1,444,446,641. The court called attention to the universal depression in values of farm lands which reached its extreme extent in 1921; to the widespread lack of any profit from farming operations; and the collapse of values, with the result that in that year the land was left assessed at considerably more than its value. The activities of the Tax Commission in issuing orders and instructions to the local assessors were referred to as indicating a consistent and sustained effort to honestly assess the lands at their actual cash value.

From this review the court found that the plaintiff had entirely failed to show under-valuation of the agricultural lands in the year 1921 and had certainly come far short of showing any "intentional or systematic under-valuation." On the other hand the court expressed confidence of the intent and purpose of the Tax Commission and of the various local officers to systematically raise values of such lands to actual cash value; that if any criticism could justly be made, it was of the extent of the increases made from year to year, and that therefore the claim of systematic under-valuation was entirely unsupported.

As to the arbitrary over-valuation of plaintiff's property, the court was equally positive in its view that this was not shown. The provisions of the governing statutes were cited, under which the plaintiff had reported the value of its total tangible property at the sum of $47,057,991. The assessment fixed was about $42,000,000, or five million dollars less than the amount fixed by the plaintiff. This stated value was held to be competent evidence of the value of the property, *Atchison &c. R. R.* v. *Sullivan,* 143 Fed. 465, and to negative at once the allegations of wilful arbitrary over-valuation on the part of the commission, which had fixed a valuation five million dollars less than this sum, especially as no evidence was submitted that the commission had placed any valuation upon the franchises.

The plaintiff alleged absence of net income, which the court held to be an item to be considered but held that under extraordinary conditions the absence of profit could not be urged as justifying a court in finding no value, as such a construction would result in the application of the principle to the largest item of property in the state — agricultural lands, which the record showed not to have provided the owners, in the most favorable portions of the state, sufficient income to pay the taxes assessed upon them or no income whatever.

In conclusion, the court held that the proofs fell far short of sustaining the allegations of the complaint that the defendants had disregarded the report and had wilfully and fraudulently disregarded the true value of the property of plaintiff or had knowingly, fraudulently, and arbitrarily added to the physical and actual value a fictitious or arbitrary sum on account of franchises, and it accordingly ordered the complaint dismissed and the preliminary injunction dissolved.—*Chicago & N. W. Ry. Co.* v. *South Dakota Tax Commission,* U. S. D. C., So. Dak., Mch. 31, 1922.

Equality—Relief and Review.—The federal district court in Ohio had for determination the question of the effect of the "uniform rule" in taxation, required by the constitution of that state and the

power of a court of equity to afford relief by way of injunction, to restrain the collection of a tax upon a corporation, assessed by the tax commission, where the allegations were overvaluation and discrimination, by reason of general undervaluation of property in the county where the corporation was located.

The state moved to dismiss on the pleadings, upon the ground that plaintiff had a clear remedy at law and that having paid the first instalment of the tax on the assessment as made, it could not maintain the action to restrain collection of the second and final instalment. The plaintiff alleged that it had in the first instalment paid more than it could have been called upon to pay if its assessment had been properly and legally made and if other property generally in the county had been assessed upon the same basis of value as was applied to its property.

The court prefaced its decision with a discussion in considerable detail of some fundamental principles, which are often overlooked. It observed that the assessment of property is primarily a legislative function and that resort to the courts is fundamentally a judicial proceeding and is not, as was claimed, a mere extension of a ministerial or legislative function, so that the Ohio statute, giving a remedy by a proceeding in the state court was not an exclusive remedy, required to be pursued to the exclusion of other permissive procedure.

Following this, attention was called to the fact that this statute, asserted as giving an exclusive remedy, limited the court in extending relief only to cases where the taxpayer could show by clear and convincing evidence that the value of property as determined by the tax commission was not the " true value in money of such property." It could not entertain a proceeding on any other ground and could not revise or equalize generally, and could not therefore give relief in cases where there was a general undervaluation of other property and reduce the value of the property in question, in view of this general undervaluation, if such reduction would place it below its true value in money.

It asserted, however, as established law, that a taxpayer was entitled to relief, not only if his property was assessed too high, considered by itself, but also if the assessments of others were relatively too low, citing Ohio authority as well as the familiar federal decisions. It held, therefore, that the remedy at law was inadequate; that the remedy at law, to deprive a court of equity of jurisdiction, must be as " certain, complete, prompt and efficient to attain the ends of justice as the remedy in equity" (134 Fed. 1, 10; 212 Fed 76); that " if the remedy at law be even doubtful, a court of equity will take cognizance of the suit" (156 U. S. 680, 688; 247 U. S. 282).

It held that the petition made a cause of fraud, citing the oft-quoted language in *Taylor* v. *L. & N. R. Co.,* 86 Fed. 350, at p. 374.

The justiciable stage having been reached, plaintiff could assert its rights at once in the federal court to obtain relief from action violative of the federal constitution. 323 U. S. 134.

Concluding, the court held that when the constitutional rule that property should be assessed at its true value in money had been violated and the basis of valuation was sixty per cent or some other per cent, less than one hundred, the courts will grant relief to those whose property is assessed in excess of the adopted percentage, observing that " the rule of equality must prevail " that " if a taxpayer's property is valued in excess of the rules adopted by the taxing authorities, he is illegally burdened; and if the taxpayer is a public utility [the case here], the public that patronizes it bears a part or the whole of that burden, unless its charging rate is unalterably fixed."

The objection that the application for relief came too late was rejected on the authority of *Cozad* v. *Hubbard,* 19 O. C. C. 294.

The motion to dismiss was denied and the case ordered to trial on the pleadings. —*City Railway Co.* v. *Beard,* U. S. D. C. Ohio, June 5, 1922.

Uniformity.—In an Illinois case it appeared that the county clerk in one of the two counties in which a community high school district was located, failed to extend the tax levied by the board of education, although it was extended in the other county. A railroad claimed that the failure of the one county clerk to extend

the tax invalidated the whole tax because it violated the constitutional provision requiring all taxes to be uniform. The court upheld the tax, on the ground that it was properly levied and that the accidental, unintentional or erroneous omission from taxation occurring through the negligence or default or mistaken judgment of officials to whom the execution of the taxing laws was intrusted should not be held to vitiate the whole tax. The court pointed out the statutory provision authorizing the assessment of property omitted from assessment in previous years, and said that if the taxing authorities collected the tax under this provision, uniformity would be accomplished. — *Peo. ex rel. Loehr County Collector* v. *Missouri Pac. R. Co.,* 134 N. E. 314.

Railroad — Apportionment to State of Interstate System.—Under the Kentucky statutes it was sought to list for taxation as omitted property the proportionate part of the franchises or intangible property of a foreign railroad company, that the controlled lines of such company in Kentucky bore to the owned and controlled lines constituting its entire system. It appeared that the foreign corporation owned all the stock of a Kentucky corporation whose property it operated as a part of its system and whose revenues were taken by it and mingled with its own. The foreign corporation made no report to the state. A report was made by the Kentucky corporation which was assessed. The court, looking at the substance of the matter, found that the foreign corporation did, as a matter of fact actually own and operate the lines in Kentucky, and consequently held that it should have been assessed for its intangible property based upon the proportion of the mileage in Kentucky to the entire system mileage.

In disposing of the claim that such method would result in taxing property in Kentucky that had no situs there, the court held that the franchise or intangible property subject to local taxation need not be valued alone according to the business done within the taxing authority, but might be valued according to the business done over the entire system. — *Commonwealth ex rel. Hawkins, Sheriff,* v. *Southern Ry. Co.,* 237 S. W. 11.

Car Company—Privilege Tax. — The state of Arkansas sought to impose a privilege tax on a private car company. It appeared that the company was a New Jersey corporation and that its principal office was in Missouri. It had no branch office in Arkansas for the transaction of business. Its cars were turned over to and operated by various railroads, under contracts made in Missouri, and some of such cars passed through, came into or went out of Arkansas. The company had nothing to do with the routes of the cars or the transportation of the freight. The court held that the company was not doing business within the state and hence was not subject to the tax, citing *Pickard* v. *Pullman Southern Car Co.,* 117 U. S. 34, where the facts in all essential respects were similar.

The state relied upon *Fargo* v. *Hart,* 193 U. S. 490, to uphold the tax, but the court held that that case had no application, as it dealt with the liability of a foreign corporation for a property tax, and not with a tax levied for the privilege of doing business.—*State ex rel. Arbuckle* v. *American Refrigerator Transit Co.,* 237 S. W. 78.

Corporation Franchise — Insurance Company.—The activities of an Arkansas mutual insurance company consisted of the soliciting of applications for membership, the issuance of policies, the collection of assessments and the payment of salaries to its officers. The policies were graduated in amount, depending upon the length of membership, and the death benefits were paid from assessments upon the membership. All excess assessments were applied to subsequent death claims. The court held that such company was not subject to the state franchise tax, as its activities did not constitute the doing of business for profit contemplated by the statute.—*State ex rel. Atty. Gen'l* v. *Bankers and Planters Mut. Ins. Assn.,* 238 S. W. 17.

Mining—Production Tax. — The first step in the litigation begun in Minnesota to test the legality of the Act of 1921, imposing a tax based on the value of iron ore mined, has been reached, by a decision of the district court sustaining the act. The opinion is brief, evidently intended to

furnish a basis of appeal, as the magnitude of the production indicates probable final resort to the Supreme Court.

The court held that the mining of ore was a business, apart from and independent of the business of selling or transporting the ore so mined; that such business might be lawfully made the subject of an excise, business or occupation tax. *Stratton's Independence* v. *Howbert,* 231 U. S. 415; that the tax in question was an excise tax upon this business and not one upon the ore or the income from its sale, and that the method of determining the tax was not so inequitable as to render the tax obnoxious to the uniformity clause of the state constitution or violative of the Fourteenth Amendment.

The language in *American Mfg. Co.* v. *St. Louis,* 250 U. S. 464, was found controlling. — *Bennett Mining Co. et al.* v. *Samuel Lord et al.,* U. S. Dist. Ct., Minn., May 24, 1922.

BANKS.—The Appellate Division of the New York Supreme Court affirmed the decision of the lower court in the Hanover bank case, which was noted in the *Bulletin* for March, 1922, p. 193 (193 N. Y. Supp. 601).

The decision is based on the holding that dividends from national banks may not be included as income under the state income tax law, this being in direct conflict with the previous ruling of the Attorney General, under which such dividends have been heretofore taxed.

By eliminating this tax, which is done as a matter of construction, the court is left with the question of discrimination, between the 1% tax on the shares of banks as compared with the miscellaneous assortment of indirect taxes on intangible property other than bank shares, imposed through the various corporation taxes, plus the individual income tax on the income derived from such property. On this point the argument and holding of the lower court is practically followed, that no discrimination was shown.

The case will naturally be carried to the Court of Appeals and eventually to the Supreme Court. — *People ex rel. Hanover Nat. Bk.* v. *Goldfogle.* 195 N. Y. Supp. 753.

BANKS. — The bank tax situation in North Dakota has been rendered acute by the decision of the supreme court of that state that there can be no taxation of bank shares. The case involved a consideration of the legislation enacted in recent years, culminating in the enactment of an income tax and the exemption of intangible property from all property taxation. Evidently it was not intended to include bank shares in this exemption, but the court properly held that where language used was unambiguous, there was no room for construction or assumptions as to the legislative intent and that the words "bonds and stock" in the act repealing the property tax thereon, necessarily comprehended bank shares. It observed that courts could not be concerned with the policy reflected in legislation or with the motives actuating such legislation.

The effect of the federal Revised Statutes entered into the decision, the court holding that earlier legislation placing a low rate on moneys and credits must have included bank shares, to comply with the federal limitations, and hence bank shares could not then have been considered as being in a different class from other shares, and this situation must therefore have been recognized when the moneys and credits tax was repealed.

A very lengthy dissenting opinion was filed, in which strong ground was taken in opposition to the majority view, upon the grounds that as the case concerned state banks only, no reference to the federal statutes was permissible and that the shareholders were not represented in the case and the bank as such had no standing to contest the taxes sought to be imposed upon the shares.

The result of this decision is that the state is left with a tax on the real and tangible personal property of state banks and the personal income tax on the dividends from the shares. It does not appear what the situation is as to national banks, as they were not involved.—*State* v. *Wallace,* 187 N. W. 728.

BANKS—DEDUCTION OF MORTGAGE SECURITIES. — The tax contemplated by section 6343, Rev. St., Nebraska, 1913, as amended by Laws 1915, c. 108, relating to the taxation of banking corporations, is a tax upon shares of stock in the hands of

stockholders, and is not a tax upon the property of the corporation.

In making an assessment upon the shares, the assessor should not deduct from the total value of the shares mortgage securities held by the banking corporation upon which the mortgagor has agreed to pay any tax which may be levied against the mortgage or the debt secured thereby.—*Creighton Nat. Bank of Creighton* v. *Knox County et al.,* 188 N. W. 301.

BANKS.—The Oklahoma court held that the law governing the assessment of shares of stock of state and national banks was definitely settled. It stated such principles to be that the assessment was not against the corporation upon its moneyed capital, surplus and undivided profits, but was against the shares of stock in the hands of the stockholders and that the officers of the corporation act as the agents of such stockholders both in listing the shares of stock for taxation and in paying the taxes levied thereon; that such shares of stock are to be assessed at their true value, which may or may not coincide with their book value and that in determining such value, no deduction is to be made on account of the capital of the corporation invested in securities which are exempt from taxation. —*Longcor, County Treasurer,* v. *Central State Bank of Enid,* 204 Pac. 1099.

BANKS—LOUISIANA LAW. — Assessment of bank stock to shareholders was held annulled by amendatory act requiring assessment to bank.

Bank purchasing assets of another bank did not assume payment of taxes on the stock.—*Hughes* v. *City Trust & Savings Co.,* 91 So. 747.

FOREIGN CORPORATION'S INTANGIBLES—SITUS—BUSINESS SITUS.—The California court had for consideration the question, often presented to administrative officers, of the situs for taxation of the accounts and credits of a foreign corporation doing business in the state through a branch house or office, involving a large volume of business, requiring the extension of credit, with consequent outstanding accounts, managed through the branch house, subject to general direction from the home office, the contracts being either made at that office or being subject to its approval. In this case an assessment was made covering solvent credits arising from sales on credit contracted through the California agency of a Pittsburgh corporation. The tax was paid and suit brought to recover.

The court stated the question to be as to whether those credits were property in the state, within the meaning of its constitution and laws. Starting with the familiar doctrine of *mobilia sequunter personam,* the court found that this doctrine had been uniformly followed in previous decisions and that the facts in this case did not bring it within the exception to the rule, arising in cases involving a so-called "business situs", announcing its conception of the basis for this exception to be "where the possession and control of the property right has been localized in some independent business or investment, away from the owner's domicile, so that its substantial use and value primarily attach to and become an asset of the outside business" and "where the business controls and utilizes in its own operation and maintenance the credits and the income thereof," citing a summary of the distinction from the opinion in *Stanford* v. *San Francisco,* 63 Pac. 145, the facts in which were found precisely identical with those in this case, the credits being found by the lower court to be incident to the business of the corporation in Pittsburgh, Pa., and therefore not property in California. This finding was sustained, and it was held that the corporation was conducting the branch of its business upon its general corporate capital, for the general benefit of its central factories and the credits were part of its general corporate assets, with no more relation to the Los Angeles agency than if they had been contracted in Canada or Cuba, and that in the absence of further legislation changing the status of intangible assets for purposes of taxation, no reason was seen for a departure from the rule consistently followed by the court.—*Westinghouse Elec. & Mfg. Co.* v. *Los Angeles County,* 205 Pac. 1076.

INSTALMENT SALES—SOLVENT CREDITS. —An Alabama company sold furniture under the instalment plan. A conditional sale contract was entered into with the purchaser, which provided that title in the furniture sold was to remain in the company until the full purchase price was

paid. The court held an assessment of such furniture against the company was invalid, on the ground that the company acquired out of such transactions solvent credits which were exempt from taxation. —*State* v. *White Furniture Company,* 90 So. 895.

Assessment Methods—Arbitrary Action.—The court held that where a board of equalization of a California county had arbitrarily increased the assessment upon mining property, by the application of a mathematical formula and without any evidence to contradict that of the property owner, which showed a much lower valuation, the assessment should be held void, to the extent of the increase over the value fixed by the assessor.

The board was held to have disregarded evidence that the values were as fixed by the assessor and without evidence to support their action, to have increased the assessments, to the great injury of the rights of the mining companies.—*Shasta County* v. *Mountain Copper Co.,* 278 Fed. 155.

Administration—State Tax Commission.—In passing upon the legality of the exercise of a certain power by the Public Service Commission the Indiana court referred to its previous holding that the State Board of Tax Commissioners was a body of special statutory powers and that any acts exercised outside of its granted powers were absolutely void. — *New York Central R. Co.* v. *Public Service Commission of Indiana,* 134 N. E. 282.

License—Motor Vehicles.—A Florida statute imposing license taxes on motor vehicles and prohibiting the use of vehicles of a certain weight on country roads was upheld on the ground that neither the classification nor the taxes were unreasonable and that the prohibition, when considered in connection with the character of the existing highways, also was not unreasonable. — *State ex rel. Bonsteel* v. *Allen,* 91 So. 104.

License — "Blue Sky" Law. — The Nebraska court held a sale of stock invalid because it appeared that the sale was entered into in Missouri, and the seller had not obtained a license from the bank commissioner of that state, permitting him to sell corporate stock there. The seller had its principal place of business in Nebraska and had no place of business in Missouri. The transaction in Missouri was carried on by the seller's agent who went into that state for such purpose.—*Rhines* v. *Skinner Packing Co.,* 187 N. W. 874.

Enforcement, Federal Taxes. — The Volstead act contains a provision imposing what is designated a "tax", with an additional penalty for violation. Plaintiff was summarily assessed under this provision and the usual notice and demand for payment was sent him. He brought this aciton to restrain the collection, claiming that the so-called tax was a penalty for an alleged criminal act which was sought to be enforced without hearing, indictment or trial by jury, contrary to the federal Constitution; that if construed as imposing a tax, the provision was unconstitutional.

The lower court, following *Ketterer* v. *Lederer,* 269 Fed. 153, dismissed the bill, for want of equity, 274 Fed. 493; *Bul.* VII, 120. The Supreme Court reversed, holding that the mere use of the word "tax" was not enough to show that within the true intendment of the term a tax was laid; that the imposition was clearly a penalty; that this being so, section 3224 R. S., prohibiting suits to restrain collection of federal taxes did not apply and that Congress did not intend that penalties for crime should be enforced through secret findings and summary action of executive officers; that even as to collection of taxes, before enforcement the taxpayer was entitled to fair opportunity for hearing as an essential to due process of law. The court held that the injunction should have been granted.—*Lipke* v. *Lederer,* U. S. Sup. Ct. June 5, 1922.

Taxes — Collection — Taxes Due from Insolvent have Priority over State Taxes. — Under Article 6 of the federal constitution, and Rev. St., sec. 3466, taxes due to the United States from an insolvent corporation have priority over taxes due under the laws of the state.—*U. S.* v. *San Juan County,* 280 Fed. 120.

Limits.—The Missouri Court restrained the levy of a tax for the building and repair fund of a consolidated school district

because the tax was in excess of the maximum rate for school purposes, fixed by the state constitution. — *Jacobs* v. *Cauthorn,* 238 S. W. 443.

Relief and Review — Injunction to Restrain Tax. — It was held in Minnesota that where a tax can be enforced only in the manner and by the procedure provided by the general tax laws, such laws afford an adequate remedy if the tax be illegal, and a suit in equity to enjoin the taxing officers from levying it cannot be maintained.—*Wall* v. *Borgen,* 188 N. W. 159.

Exemption—Municipal Securities.—The Nebraska court held that warrants issued by a municipality were exempt from taxation, on the theory that such warrants were instrumentalities of the government, issued for a public purpose, and that to tax them would hamper and impede the functioning of the local government issuing them.—*Droll et al.* v. *Furnas County et al.,* 187 N. W. 876.

Exemption—Charitable and Benevolent Societies. — Under the West Virginia laws, lodges and orders of Free and Accepted Masons are charitable and benevolent bodies, and their property, when used solely for charitable and benevolent purposes and not held or leased for profit, is exempt from taxation. — *In re Masonic Temple Soc.,* 111 S. E. 637.

Interstate Commerce. — A telegraph message between two points in Arkansas but passing over the established route of the company, part of which was without the state, was held to be an interstate message, following *Western Union Tel. Co.* v. *Speight,* 254 U. S. 17.—*Shannon* v. *Western Union Telegraph Co.,* 238 S. W. 59.

Contract, Violation of — Official Forms and Blanks.—A Colorado irrigation district issued bonds, and upon default in interest the bondholders obtained judgment. To collect this judgment, mandamus was brought to compel the levy of a tax sufficient therefor, and one question at issue was as to whether the district taxes should be collected separately from the general property taxes. The state tax commission had directed the collector to use separate receipts, acting under its general power to prescribe forms, etc. The court held this in violation of the statute and that the commission must accommodate and adapt its forms to the statute.

The court further held that the amendment of the act, made since the issuance of the bonds, whereby special district taxes were made collectible separately from the general property taxes, constituted such a variation as to deprive the bondholders of constitutional rights, guaranteed to them by the contract in the bonds; that the act in force when the bonds were issued constituted a part of the contract, which was violated by the amendment providing different procedure for the levy and collection of the taxes than that which existed when the bonds were issued; that the differences were material and the remedies of the bondholders were not as adequate and efficient.—*Moore* v. *Gas Securities Co.,* 278 Fed. 111.

"Tax". — The California Act, providing for a toll, which the holder of light and power franchise pays for the use of the highway, was held a matter of contract, and not a tax. — *Tulare County* v. *City of Dinuba,* 206 Pac. 983.

Inspection Fees — Interstate Commerce.—Under the Ohio statutes state inspection of petroleum and other oils was required and an inspection fee was imposed. An oil company doing both intrastate and interstate business, sought to enjoin the enforcement of the act, claiming that it was unconstitutional, because interfering with and imposing an excessive burden on interstate commerce. It was shown that the fees collected during the preceding five-year period were double the cost of inspection. The state contended that the intrastate and interstate shipments were separable and that the latter were inspected at a loss, and asked the court to apportion the expense of inspection between the interstate and intrastate shipments and to find the charge on the former reasonable, and that on the latter a proper inspection fee and excise tax. The court enjoined the enforcement of the act, on the ground that the fees were unreasonable and disproportionate to the services rendered and imposed a direct and unlawful burden on interstate commerce. In passing upon the

request of the state that the expense of the inspections be apportioned, the court held that as the act made no provision for such apportionment, it was not permissible for it to comply, for the reason that in interpreting statutes levying taxes, it was the established rule not to extend their provisions by implication beyond the clear import of the language used.—*Cleveland Refining Co.* v. *Phipps,* 277 Fed. 463.

Local Option. — An Oklahoma statute providing for the liquidation of back taxes and assessments, by conferring jurisdiction on the district courts, in towns and cities having a population in excess of 3,500, to order the sale of the property and the distribution of the proceeds, after settling back taxes and assessments, was held invalid on the following grounds: that the statute was local legislation which was forbidden by the constitution; that the classification by population was discriminatory; that the power delegated to the district court was non-judicial, which in the absence of a constitutional provision authorizing such a delegation, could not be conferred; and that the constitution required the delegation of such power to the local authorities.—*Board of Commissioners of Grady County* v. *Hammersley,* 204 Pac. 445.

OHIO TAX INJUNCTION VACATED

As we go to press we learn that the Ohio Supreme Court has unanimously ordered the taxation amendment placed on the ballot.

BOOK REVIEWS

Holmes, George E., Federal Income Tax. 1922 Edition. The Bobbs-Merrill Co., Indianapolis. pp. vii, 1508.

The enactment of a new federal revenue law always results in a serious burden being imposed, not only upon those who must deal with the law, whether as taxpayers or as students, but also upon the commentators who are obliged thoroughly to revise their manuals with each legislative change.

Mr. Holmes has assumed his share of this burden on the commentators in a thoroughly satisfactory manner in the 1922 edition of his Federal Income Tax. The work includes also an excellent treatment of the war profits and excess profits taxes, together with brief chapters on the stamp, capital stock and child labor taxes provided in the 1921 revenue act. Brief chapters are devoted to such topics as information at the source, tax covenants and the construction of taxing statutes. This material occupies but a small part of the volume, the bulk of which is devoted, in this as in earlier editions, to an exposition of the federal income and profits taxes.

As a manual on these taxes Mr. Holmes' book leaves little to be desired. The exposition of the tax law is elaborate and detailed; it is well fortified with citations to administrative rulings and regulations and to the court decisions. Concrete illustrations of the application of these principles in specific cases abound. The point of view of the treasury department is set forth with clear insight and with a sympathetic appreciation of the problems involved.

Those who must deal in a practical way with the intricacies of the federal income and profits taxes will find this new edition of the Federal Income Tax of the greatest assistance and value. H. L. L.

The Federal Income Tax, by Robert Murray Haig, Thomas S. Adams, and others. A Series of Lectures delivered at Columbia University in December, 1920. Edited by Robert Murray Haig, with an Introduction by Edwin R. A. Seligman. New York, Columbia University Press, 1921.

The papers printed in this volume were given as a series of lectures on the federal income tax in a special course on federal

income tax problems at Columbia University in December, 1920. This compilation of papers, each by an expert in the field assigned to him, constitutes one of the most valuable discussions that has yet been presented, of some of the more important aspects of the problem of income taxation.

The scope of the lectures may be seen from the list of titles. Professor Haig presented, in the first lecture, an able discussion of the concept of income, for which he suggested the following definition: " Income is the money value of the net accretion to one's economic power between two points of time." Because of various imperfections in our economic environment it is not always possible to apply in a practical way this theoretical concept. Professor Adams' paper " When is Income Realized?" accepted the test of cash or its equivalence, in the determination of realized income. For different practical reasons the Treasury has not been able to apply this test in all cases.

The title of the remaining lectures, with their respective authors, are as follows:

Constitutional Aspects of Federal Income Taxation, by Thomas Reed Powell; The Legal Force and Effect of Treasury Interpretation, by Fred T. Field; Reorganizations and the Closed Transaction, by Lt. Col. Robert H. Montgomery; Loss as a Factor in the Determination of Income, by George E. Holmes; Inventories, by Arthur A. Ballantine; Consolidated Returns, by Walter A. Staub; The Taxation of Income from Natural Resources; Relief Provisions and Treasury Procedure on Appeals, by P. S. Talbert.

This series of able lectures is deserving of wide publicity, and students of taxation will be grateful to Columbia University for issuing them in permanent form. The problems of income taxation are not all discussed, nor is there any pretense of solving those that are discussed. As a scholarly contribution to the ultimate improvement of the theory and practice of income taxation, however, they must be given a high place. H. L. L.

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(My commission expires Jan. 30, 1923.)

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A. E. HOLCOMB, Treasurer and Subscription Manager, 195 Broadway, New York City.
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A curious anomaly in bank taxation is presented by the three or four cases in which national banks are operating branch banks in other states. The present rule is that the stocks of national banks held by non-residents shall be taxed in the place where the bank is situated, and not elsewhere. On the face this would preclude the taxation of the branches in the states in which these branches are located. Fortunately there are yet less than half a dozen instances in which such a problem can arise. The National Banking Act has always prohibited domestic branch banking, but in a few instances state banks having branches in other states have been admitted to the national banking system with authorization to keep these branches.

In the case of the Bank of California, which has branches in Seattle, Tacoma and Portland, there has been an allocation of capital to each branch, the amount of which is determined by the minimum requirements of the National Banking Act according to the population of these cities. This is a purely formal arrangement, and the minimum capital of $200,000 for Seattle is no indication of the relative volume of business done by the Seattle branch, since the aggregate capital and surplus of the Bank of California is about $17,000,000. The Seattle and Tacoma branches pay taxes in Washington on $200,000 of capital as assessed locally in these cities, but it is recognized by both the assessor and the bank that this is a purely voluntary matter on the part of the latter, and it is done, for one reason, because it is less expensive for the bank to pay taxes in Washington on this basis than to contest the principle involved.

While the matter is of small importance at present, it will in time become of greater moment, as the growing pressure for the development of branch banking brings this authorization to the national banks. There is in progress a distinct tendency toward the consolidation of state banks and trust companies, and the national banks will be under a serious handicap unless they too are permitted this advantage. Branch banking will go on, once it begins, regardless of state lines, and we shall have once more the question of interference with federal agencies, the right of the state to levy on concerns in interstate business, and the discrimination against

foreign federal institutions. It might be well to take time by the forelock to the extent of authorizing, in the pending amendment to Section 5219, a proper allocation of the bank's shares to the different states in which branches are situated on the basis of the relative amounts of business done.

We regret to record the death of Cassius R. Benton, chairman of the Michigan Board of State Tax Commissioners. Mr. Benton died at his home in Northville, Michigan, on October 2, 1922. He had been active in public life in Michigan for 25 years, and since 1917 had been chairman of the tax commission.

OHIO AMENDMENTS DEFEATED

Both of the amendments for the change of the Ohio financial system were defeated in the election. One of these provided for a system of debt limitation which is already embodied in the statutes. The loss in this case is not immediately serious, although there is grave doubt if the rather strict provisions of the debt limitation law can be held in view of the need for greater current revenues than can be supplied under the existing tax laws. The second amendment proposed some modification of the general property tax, under which it was expected that greater revenues would have been available. This amendment contained drastic tax rate limitations, the effect of which, it was expected, would have been to force the early development of other sources of revenue than the property tax. The rate limitations were considered necessary in order to persuade the rural population to approve a modification of the uniform rule. Evidently this was not what was wanted as a substitute for the uniform rule; indeed, there is apparently not going to be a substitute for some time to come. Meanwhile, the land owners and small property owners will continue to pay the taxes, and what cannot be raised in that way will be borrowed, as before.

An important element in the opposition was the attitude of the State Teachers' Association, which took the ground that the proposed rate limitations endangered the future of the school revenues. This was perhaps a somewhat debatable conclu sion, but it proved an effective criticism, as is evidenced by the result at the polls.

CLASSIFICATION AMENDMENT IN TENNESSEE

The Tennessee legislature voted at the last session to submit a classification amendment at the recent election, but because of some irregularity in the procedure the attorney general ruled that it would not be valid if adopted and the vote was not taken.

GASOLINE TAXES IN MARYLAND

Judge Oscar Leser of Baltimore sends the following summary of the taxes on gasoline recently imposed by the Maryland legislature. Two acts were enacted. The first (Ch. 521) is of a temporary character and imposes a tax of 1c. per gallon for the special purpose of meeting the deficiency of over a million dollars in the maintenance and construction account of the state roads commission. The tax is additional to the registration and property taxes now imposed. This act expires on January 1, 1924, or earlier should the amount of the deficiency be made up before that time.

The second act (Ch. 522) is a permanent tax. Judge Leser summarizes it as follows:

"It imposes a tax of 2c. per gallon to be collected from the dealers and is intended to be a substitute for the registration or license taxes now imposed, at least so far as pneumatic tire vehicles are concerned. It does not, however, exempt motor vehicles from the state and local property tax. In order that there may be no diminution in the amount now collected in registration fees, the act provides for a computation to be made by the governor of the probable yield based upon the known results, which will then be available, of the 1c. tax. Should the 2c. tax not yield as much as the present registration tax, then there is to remain such proportionate part of the registration tax as will make good the deficiency. Chapter 522 also provides a new and lower schedule of special registration taxes on solid tire vehicles.

"There are suitable provisions for the regulation of 'dealers', by whom the tax

is collected and paid monthly to the state comptroller; also for refunds on purchases 'made for purposes other than consumption and use in furnishing the propelling power of motor vehicles used in whole or in part upon the highways of the state'. Section 8 exempts any motor vehicle fuel 'when exported or sold for exportation to any other state or nation'; and section 9 authorizes a refund where the fuel has been purchased 'for the purpose of operating or propelling stationary gas engines, tractors used for agricultural purposes, motor boats, air planes or air craft, or for cleaning or dyeing or other commercial use of the same, except in motor vehicles operating or intended to be operated in whole or in part upon any of the public highways'.

"The present registration tax is at the rate of 60c. per horsepower on pneumatic tire vehicles with a special schedule of charges for trucks and other solid tire vehicles.

"One of the interesting features of chapter 522 is the provision in section 14, authorizing the governor to enter into a reciprocal agreement (effective January 1, 1924) with the District of Columbia, for an exchange of courtesies in the use of the roads. I believe that the only instance in which such a reciprocal agreement does not at present exist as between each state and every other state or territory is that of the District of Columbia and Maryland. This has given rise to intermittent controversies and much bad feeling. So long as the registration fee system prevailed it did not seem possible to devise any fair plan for reciprocal use of roads, in view of the fact that Maryland is a state with a very large mileage of excellent roads, while the District of Columbia is a mere municipality, many of whose residents make use of the good road facilities of our state. One of the great virtues, therefore, of the new system of motor vehicle taxation is to make reciprocity possible. Indeed, it would seem that if the 2c. tax proves to be sufficient without additional registration fees, a fair and proper adjustment of the burden of maintaining roads would be automatically provided for."

STATISTICS OF INCOME FOR 1920

The Treasury Department has recently issued the summary of the statistics of income for the year 1920. The tables are prepared along the lines already established in the earlier annual reports, but the current volume includes, in addition, brief summaries of the capital stock tax returns for 1922 and of the federal estate tax returns for the years 1916-1921.

The material which is being accumulated by the internal revenue bureau relative to incomes and wealth is of inestimable value for the economist who is interested in the larger problems of the distribution of wealth and incomes, as well as for those students of finance whose primary interest is in the practical operation of the revenue system and the diffusion of the tax burden. The brief annual summaries which are published by the bureau set forth the salient facts, but they lack that refinement of analysis and elaboration of detail which is desired by the student of economic and social phenomena. The current report contains some comparative data by means of which we may observe certain aspects of the progress of federal income taxation. This comparison runs back to 1916, but in this brief summary of the results we shall begin with the year 1917, in order to have a uniform minimum exemption for single and married individuals.

The first significant fact disclosed by the comparative summary is the great increase in the number of returns. The total number of returns made in 1917 by persons having an income in excess of $1,000 if unmarried or of $2,000 if married, was 3,472,890. In 1920 this number had risen to 7,259,944. It is significant, also, that all of this increase has occurred in the lower income groups, and that by far the greatest part has occurred in the lowest income groups. For the lowest three income classes the increase has been as follows:

Income Class	*Increase in the Number of Returns, from 1917 to 1920*
$1,000 to $2,000	1,031,192
2,000 to 3,000	1,730,609
3,000 to 5,000	776,353

On the other hand a very sharp decline occurred in the number of large incomes

reported. In 1917 there were 6,664 returns of income of $100,000 and above. This number has dropped to 3,649 in 1920.

A similar variation is found, as is to be expected, in the amount of net income reported in the different income classes over this period. The total net income reported in all income classes rose from $13,682,383,207 in 1917 to $23,735,625,183 in 1920. But in the same period the total net income reported in the income classes of $100,000 and over dropped from $1,606,516,153 in 1917 to $717,004,763 in 1920.

A second fact of interest disclosed by the comparative summary is the marked shift which has occurred in the sources of the income reported by individuals. This may be shown by comparing the sources of income for the years 1917 and 1920:

explains in large measure the remarkable increase in the number of returns filed by individuals in the smaller income classes. By no means all of the income reported in small amounts consists of personal earnings, but there can be no doubt that a large proportion of the smaller incomes do spring from this source.

The changes in the sources and in the volume of individual incomes during the past few years that are here so briefly summarized open up a most interesting and suggestive field of study. No complete explanation of these changes can be made without much more elaborate investigation of the facts than can be made with the data available in the various annual summaries of income statistics. The complete record of income tax returns will prove a veritable gold mine of informa-

Source of Income	*Year* 1917	*Year* 1920
A. Personal Service	(000 omitted)	
I. Salaries, wages, commissions, bonuses, directors' fees, etc.	$3,648,437	$15,270,373
II. Business, trade, commerce, partnership, farming, and profits from incidental sales of real estate, stocks, bonds and other property	3,958,670	5,927,327
	$7,607,107	$21,197,700
B. Property		
I. Rents and royalties	$684,343	$1,047,423
II. Interest on bonds, notes, etc.	936,715	1,709,299
III. Dividends	2,848,842	2,735,845
	$4,469,901	$5,492,568
Total income	$12,077,009	$26,690,269
General deductions	885,763	2,964,640
Net income	$11,191,246 *	$23,735,629

The most amazing fact disclosed by this table is the increase which has occurred in the volume of incomes reported as personal service income, and especially the first sub-class, designated as wages, salaries, commissions, etc. In 1917 this source provided 32.6% of the income reported in the classes of $2,000 and above, and only 36.7% of the total net income reported in that year, assuming that all of the income reported in amounts between $1,000 and $2,000 was from this source, which of course was not the case. In 1920 this source provided 63.9% of the total net income. This increase accords with and

tion for the future investigator, when Congress may see fit to open them to the proper kind of analysis. Meantime we can only speculate over the causes. No doubt the decline in the very large incomes reported was due in part to the high rates, which tempted the recipients to resort to every device that ingenuity could suggest and that legal talent could execute, for the manipulation of returns in favor of the taxpayers. The immense volume of tax-exempt securities also proved a Godsend for those who were subject to the higher rates of the income tax. The decline was due in part also to the diminu-

* The figures for 1917 were compiled from the returns of $2,000 and over. On the basis of the number of returns filed and the average net income, it is estimated that the net income reported in the income class $1,000–$2,000 in 1917 was $2,461,137,000.

tion of the profits margin which usually occurs in the later part of the prosperity phase of the business cycle, as costs begin to overhaul prices. The steady and rapid growth of personal earnings is evidence of the rate at which the advance in wages and other forms of compensation for such services went on, and of the degree to which this advance was carried. These explanations would readily occur to any-one, and taken together, they may account for a part of the changes which we have noted. It is to be hoped that a more complete analysis of the facts and of the causes may soon be undertaken by competent statisticians in order that we may have available an authoritative survey of the distribution of wealth and incomes in the United States.

H. L. L.

APPORTIONMENT OF FEDERAL AID AND THE TOWNER-STERLING BILL

RUFUS S. TUCKER, PH.D.

There are two possible objects in distributing federal money among the states—either to compel the wealthier states to share their wealth with the others, or to promote some particular activity involving expenditure. The first object cannot be attained to any considerable extent under a fifty-fifty plan; the second involves difficulties that will be discussed presently.

To obtain federal money under a fifty-fifty scheme a state must raise for itself an amount equal to what comes from Washington. It must also raise its share of the federal taxes from which the subsidies are derived. Now, one-fourth or more of the federal revenues comes from indirect taxes, or customs duties, which are in most cases taxes on consumption. They are frequently collected from manufacturers or business men in certain industrial centers, but their effect is simply to raise the cost of living of each person using taxed articles. As the people of different states do not differ much in the extent to which they use tobacco and automobiles and goods that have been transported in freight cars, and soft drinks and theater tickets and other taxed articles, there is not much chance of transferring wealth from state to state by means of this sort of taxes.

There seems to be a considerable difference among states in the extent to which they pay the other three-quarters of the federal revenues—the income and corporation taxes. New York, for example, seems to pay over one-quarter of the total personal and corporation income tax and Alabama only one-third of one per cent. Even when reduced to a per capita basis, New-Yorkers pay over fifteen times as much as inhabitants of Alabama and Arkansas. But over half of the income tax is paid by corporations and is consequently a business tax; in part it results in higher prices of goods made or sold by those corporations; in part it results in a slowing-up of the growth of the country's business; to the extent that it is paid by financial concerns it means higher rates of interest to borrowers all over the country. Even the personal income tax has the effect of preventing a certain amount of saving and thereby diminishing the supply of loanable funds. Consequently even those states that do not pay very much income tax directly cannot avoid paying indirectly if they have business dealings with the others, although it is impossible to measure how much. Moreover many of the corporations that pay federal taxes from offices in New York or New Jersey really carry on their business in other states, and their employees and stockholders in those states are directly affected by the taxes they pay.

For the privilege of receiving $2,571,370 under the Towner Bill from the federal government the state of Alabama must raise $2,571,370 itself, and the residents of Alabama must further contribute between $350,000 and $410,000 to the federal government for the purpose of distribution to the states and between $1,050 and $1,230 for the expenses of the Department of Education. These figures are based on the proportion of federal internal revenue collected in Alabama in recent years. In addition the people of Alabama

must expect to have more difficulty in obtaining loans from Northern banks, and to put up with higher freight rates than would otherwise be necessary, and to pay more for manufactured goods, both imported and domestic. In exchange for these money payments they will get the privilege of carrying on certain educational activities subject to constant interference from Washington, when for only a slightly higher price they could create a first-class educational system of their own.

In the case of other states supposed to be benefited by the Towner Bill, the amount of increased federal taxes payable by their citizens under the proposed law is considerably greater than in Alabama. Virginia, West Virginia, North Carolina, South Carolina, Oklahoma, and Texas would themselves pay the equivalent of more than one-third the amounts they would receive; Louisiana would pay over one-half. In view of the inevitable waste and friction of divided authority it might well be cheaper to remain independent of federal aid, and much more satisfactory.

These states could raise as much money for themselves as the sums intended for them in the Towner bill, by adding only a very slight amount to their property taxes. If assessments were raised to equal the real value of property, most of the states would not require more than one mill extra on the rate, or one dollar in a thousand. Alabama and Mississippi might require 1.6 or 1.7; Arkansas 1.5; Louisiana 1.3; and Arizona 1.2 mills. Nevada on the other hand would require only 0.4 mills. Or the money could be raised in other ways; income taxes are unknown in most of these states, and inheritance taxes are either non-existing or else imposed at very low rates. If the prospect of obtaining federal aid should cause these states to postpone the much-needed reform of their revenue systems, the sums received from the federal government would be much too small to compensate for the loss and injustice involved in continuing along the traditional paths.

Take, now, the second object of federal aid — the promotion of some particular activity. The simplest way to do this would be to have the federal government take complete charge of that activity; but in the case of education that would be unconstitutional. The next simpler way would be to have the federal government supervise closely the expenditure of federal funds by local authorities. This is the method adopted in England and other European countries where on account of local prejudice or other reasons central administration seemed inexpedient. "Grants-in-aid," as they are called in England, are advocated and justified mainly on the ground that they give a good excuse for control of local authorities and a means to exercise that control. We have the same situation here, in the Hughes and Lever Acts for vocational training and agricultural development. But backers of the Towner Bill declare that no supervision or control is involved; they merely intend to give the money to the states to spend according to their judgment. Yet the bill itself refutes their claim, for no state can benefit from its provisions unless it conforms to certain standards of school terms and language of instruction. If, however, no more control should ever be assumed than is now proposed, how can it be arranged that the states that need the money most and use it to the best advantage shall get shares large enough to do any good, without at the same time giving large amounts to states that do not need them, or that could raise the funds more easily themselves, and to states that will waste the funds by inefficient administration? Difficulties of this sort are constantly referred to in Mr. Sidney Webb's book, "Grants-in-Aid". In fact, similar difficulties exist even when there is a large amount of central control. Mr. Webb is a strong advocate of grants-in-aid in England, as he strongly believes in centralized government. Two leading advocates of the Towner Bill in this country have this to say about states grants to local governments: [1]

> "The mere raising of large sums of money by state taxation, and then giving it back to school units, cannot in itself insure equality of educational opportunity, no matter how long the practice is continued, nor how large the bounty."

[1] Keith and Bagley, *The Nation and the Schools*, p. 261. It is a fact that with few exceptions the states that raise the most money locally or by counties, relying least on state aid, have the best schools. Of course in some cases state aid is necessary, but it does not accomplish results unless accompanied by supervision and control.

If this is true of state aid, where control is possible, and bad conditions are right under the legislators' eyes, is it not more true of federal aid, where control is believed to be undesirable, and where the legislators are wholly out of touch with conditions in other states than their own?

The amount granted to each governmental unit may be proportioned to the amounts supposed to be contributed by the people of that unit in taxes to the central government. This scheme would simply mean substituting the will of the central legislative body for that of the local bodies in determining the purposes for which public money shall be spent, without altering the relative burdens of taxpayers. It has no merit in this country, except as a means of increasing governmental expenditures; for it is obviously easier for a well-organized group of enthusiasts to push an appropriation bill through Congress than it would be to persuade forty-eight legislatures to tax their own constituents.

As an alternative to the scheme just mentioned, the amount receivable by each state may be proportioned to the extent of the evil it is desired to remove. Give money for the removal of illiteracy in proportion to the amount of illiteracy, and so on. The objection to this method is that the states that succeed best in removing the evil automatically cut down the amount of aid they receive, while those that manage their funds poorly get larger funds as a result. It is a premium on inefficiency and extravagance unless accompanied by rigorous control.

The quotas might possibly be apportioned according to results obtained, as a reward for good administration. Instead of giving a certain amount for each child, give a certain amount for each day of attendance; instead of a certain amount for each teacher for the purpose of aiding normal schools, give a certain amount for each teacher graduating from a normal school. This method is much more complex in administration, and has the added disadvantage of helping those the most who need it the least. It is obviously easier for Rhode Island, a city state, to put every child in school two hundred days in the year than it is for Nevada or Wyoming, where the children live miles away from schools.

The bases of distribution adopted in the Towner bill are not logical nor consistent, except in the case of the $15,000,000 intended for native illiterates and aliens. Those appropriations are distributed according to the extent of the evil as closely as it can be expressed statistically. They amount to about $2.50 [2] for each native illiterate aged fourteen and over, and about $0.55 for each person of foreign birth. The greater part of the $7,500,000 for native illiteracy would go to Georgia, Louisiana, Alabama, North Carolina, Mississippi, and South Carolina. The greater part of the $7,500,000 for Americanization would go to New York, Pennsylvania, Illinois, Massachusetts, and California. As the number of foreign-born in any state is not the result of state action, but of federal law and economic forces, there can be no objection to this distribution except, possibly, that those are wealthy states and can provide the necessary funds without assistance.

The $50,000,000 for equalization of educational opportunities is distributed in such a manner that it cannot possibly bring about an equalization. One-half is proportioned to the number of children aged between six and twenty-one. These age limits are unjustifiable, for most children cease attending school much earlier than twenty-one, and the law contemplates compulsion only between the ages of seven and fourteen. Moreover, distribution according to the number of children gives larger sums to urban communities, where the necessary costs per child are less; it makes no allowance either for unfavorable local circumstances, such as distance and inaccessibility, or for differences in taxpaying capacity on the part of local units. The other $25,000,000 is apportioned according to the number of teachers, a basis which is even less adapted to equalize opportunities, for it gives the most to those who have the most. Neither of these bases offers any guarantee that the money will be well spent.

The amount involved in this appropriation is about eighty cents for each child and $38.40 for each teacher. Of the part

[2] Absolute accuracy is impossible, as the Census of 1920 is not yet completely published, and the number of native illiterates aged fourteen and over can be estimated only from the total illiterates aged ten and up and sixteen and up, with a deduction for foreign whites.

apportioned according to the number of children, over one-half goes to the states of New York, Pennsylvania, Illinois, Texas, Ohio, Georgia, Massachusetts, Michigan, Missouri, North Carolina, and New Jersey. Of these only Texas, Georgia, and North Carolina have many children not in school, and that situation is not caused by financial inability on their part. The greater part of the $25,000,000 distributed according to the number of teachers goes to New York, Pennsylvania, Ohio, Illinois, Texas, Iowa, Michigan, Missouri, Massachusetts, Minnesota, and California. As these are very nearly the states that contribute most to federal revenues, it seems very wasteful to collect money from them in order to hand most of it back.

Fifteen million dollars are appropriated for teacher-training, according to the number of teachers. Here again the states that are already best supplied get the most assistance. There are also many possibilities of dispute as to what constitutes a teacher: are part-time teachers, principals, and superintendents included? It would seem to be wiser, if the intention is to provide trained teachers where needed, to apportion the funds in accordance with the demand for teachers, not the supply; i. e., in proportion to the number of teaching positions, especially vacant ones. The amount per teacher is $23 or thereabouts.

Finally, the $20,000,000 for physical training is appropriated on the basis of population, with no allowance for the difference in the nature of the work required in cities and rural localities, among foreigners and natives, adults and children, and with no provision to ensure against waste. Over half of it goes to New York, Pennsylvania, Illinois, Ohio, Texas, Massachusetts, California, Michigan, Missouri, and New Jersey.

No general rule of apportionment can be devised that will not result in giving money to states that do not need it, nor, if devised, is it likely that any such rule could command enough support to pass Congress. Consequently it seems obvious that no money should be apportioned for state activities unless it is certain that some states absolutely cannot supply themselves with all necessary attributes of good government; and in such a case the state that cannot finance itself ought not to expect to control the expenditure of funds donated by other states.

THE SALES TAX IN ITS FISCAL, ADMINISTRATIVE AND ECONOMIC ASPECTS

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How to raise four billion dollars or more of revenue for the federal government without oppressive taxation is one of the problems which the national administion may face for a number of years to come. The excess profits tax has been abandoned. To modify further the existing tax system a tax on sales numbers many adherents especially among groups of business men.

Between those who favor a sales tax (invariably some form of tax on gross sales of commodities) and those who are opposed to a tax of the species in any form, there is wide disagreement as to what may be expected from such a levy. Much forensic ammunition has been wasted by failure to agree on the topic in hand. This has followed from the situation that several forms of a tax on gross sales have been distinguished:

1. A tax to be paid by every factor in industry and commerce from the extractive stage to the sale of the completed articles to the final consumer on the gross sales of goods, wares and merchandise.
2. A tax to be paid by manufacturers and wholesalers on the gross sales of goods, wares and merchandise for final consumption.
3. A tax to be paid by retailers on the gross sales of goods, wares and merchandise for final consumption.

There has been no advocacy worth consideration of extending the tax so as to include as well turnovers from services, sale of real property, capital assets, rent

or interest, and a possibility of a general sales tax to include such transactions will not be considered.

All of these types of sales tax embody a tax on the basis of gross or net sales of commodities, but differ as to the method of collection. The first type of tax enumerated is what is usually meant by a general sales or turnover tax, and such will be the limitation in this treatise.

It is the purpose of this study to consider these chief types of proposed taxes levied on the basis of gross sales to determine as nearly as possible to what extent they embody the principles that characterize an acceptable substitute or addition to our tax system.

IS AN ANCIENT TAX

The idea of raising revenue by a tax on sales dates at least as far back as the period of the Roman Empire, and a sales tax in some form is known to have been instituted in Egypt and Babylonia. A historical study of the tax made by Professor Seligman [1] indicates that a sales tax has invariably proved unpopular and has obtained as a system of emergency revenue for only short periods of time even under the administration of despotic rulers.

In the countries which have been under Spanish dominion or influence a general sales tax has prevailed as a main source of revenue. It still remains in Mexico, but even in that benighted country it is recognized that the tax is inordinately expensive to collect and weighs with great inequality upon the poorer classes. Its repeal was recommended by Carranza, and the present government is contemplating the repeal of the federal sales tax.[2] A general sales tax in modified form is in force in the Philippines and was the chief source of revenue in Cuba until the United States intervened and abolished it.

Until the period of the world war these were the only important examples of the application of a general sales tax. Between the time of the French revolution and the late war there was no important country which levied a general sales tax.

The staggering debts of the war-torn nations since 1914 has placed some countries in a position where a sacrifice of principle has been necessary to obtain sufficient revenue. In England, however, after full investigation and discussion, the application of a general sales tax even in modified form was rejected.[3]

The leading countries that have adopted a general sales tax are France, Germany, and Italy. In Germany it was adopted as a last resort. France was led to it by insufficiency of revenue from a high income tax, a high excess profits tax and a high inheritance tax. The inheritance tax in France runs up to 80 per cent, far higher than any place else in the world.

The only Anglo-Saxon country which has seen fit to adopt anything like the sales taxes which have been proposed for the United States is Canada. The Canadian tax is not a general sales tax, but a one per cent tax on manufacturers and wholesalers. Most foodstuffs and many other necessities including fuel are exempted. It is, in fact, a tax on a limited portion of net sales of manufacturers and wholesalers.

As will be considered in more detail elsewhere, history seems to be repeating itself in France. The experience of the past justifies a careful analysis of the several forms of taxes on aggregate sales as proposed for the United States to determine if they should not be rejected in advance of trial. Analysis will be made of the general sales tax first considered, from which application as to the advisability of the other types of gross sales levy can easily be made.

REQUISITES OF A SATISFACTORY TAX SYSTEM

Before taking up the various aspects of a general sales tax, it is necessary for bases of judgment to have an understanding as to the requisites of a satisfactory tax system.

Though there are some minor differences of opinion among the recognized students of taxation as to what constitutes the ideal desiderata of a tax system, yet there are certain fundamental principles which are generally accepted.

No nation has found it feasible, how-

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[1] *Internal Revenue Hearings Report,* 67th Congress (May, 1921), pp. 459-460.

[2] Chandler, H. A. E., "The Sales Tax and Our Fiscal System," *Commerce Monthly,* March, 1921, pp. 1-13.

[3] Comstock, Alzado, "The Turnover Tax in Great Britain," *National Tax Ass'n Bulletin,* December, 1920.

ever superior any particular tax may be, to adopt any single tax as the whole source of income. In every civilized country the use of various forms of direct and indirect taxes are combined.

But none the less there are certain standards by which any tax may be gauged to determine its justification and tests which it must meet in order to conform to the requirements of the state and justice within the state. First and most important is the principle of adequacy. If a tax does not produce the revenue desired it must be considered a failure. Second, it should do as little harm as possible to the community. Third, it should embody the administrative principles laid down by Adam Smith—it should not be too complicated; it should be certain in amount; it must be convenient as to time of payment. Finally, the taxes should be as equal as possible not only among the initial taxpayers, but among all classes in a community.

ADMINISTRATIVE FEATURES OF A GENERAL SALES TAX

Consideration of the administrative system necessary for the application either of a tax on aggregate sales of commodities, or whether collected on the gross sales of manufacturers and wholesalers or by the third alternative of a tax on the sales of retailers, discloses that complicated machinery and a large force would be required.[4]

Let us consider what the problems are that will arise in the administration of a general turnover tax, a tax on the sales of all commodities in exchange whether as raw materials, unfinished goods, or goods for final consumption. First, it would be necessary unless the unit cost of collection should be absurdly high, to eliminate the small dealers. The mere fact that any exemption is made would make necessary a system of supervision that would prevent the abuse of the exemption privilege. There would probably be certain commodities subject to special exemption either because otherwise taxed or because of an endeavor to right the more gross injustices by declaring certain commodities free from tax as are a long list of necessities under the Canadian tax on the gross sales of wholesalers and manufacturers. Goods manufactured or sold for export would necessarily have to be exempted from the imposition of a sales tax in order fairly to compete with foreign goods. Numerous other exemptions might be found practically necessary. The fact that there are exemptions necessary presupposes that drawbacks will not be allowed without some sort of an audit of their validity.

Notwithstanding the exemption of smaller dealers from levy of a tax, there would be a vast number of returns that would require a large special force of office and field auditors for check in order to forestall evasion and fraud. Not only would it be necessary to check on the taxpayers, but as is true in the administration of the income tax, on others who fail to pay taxes. Further complications would arise because of the difficulty of defining a sale unless the tax was made to include all the possible transactions which might be used to circumvent the tax if applied only to sales as such.

It sounds very simple to say that a tax would be collected on gross sales. Upon first thought all that would be necessary would be to take the totals of the sales book for a month or year or whatever the tax period, apply the rate of tax per dollar of sales and presto, the amount due would be calculated. But anyone who gives the matter more than a moment's thought will see that the calculation may be far from simple. We have mentioned the probability of exemptions of certain sales for one reason or another which would have to be verified. But even were there no exemptions there are many modifications attending sales that would offer administrative complications [5]—as for example: discounts, either cash or those made subsequent to the sale of goods; rebates for goods unsold or in case of a declining market; commissions of agents and other expenses of sale; exchange of goods for goods where no entries appear on the taxpayers' accounts; articles sold and later exchanged for articles of higher price; returns in whole or in part; conditional sales. Should the levy as has been pro-

[4] Mathews, Frederick, *Taxation and the Distribution of Wealth.* Doubleday, Page & Co., N. Y. (1914), pp. 141-149.

[5] Testimony of R. N. Miller, former Solicitor of Internal Revenue. *Senate Finance Hearings Report* for May, 1921, page 448.

posed apply only to manufacturers and wholesalers on the basis of gross sales of consumption of goods there would arise the difficult task in many cases of determining how a commodity should be classified.

The sales tax in force following the Civil War was a disappointment on account of the administrative difficulties encountered.[6] It was found necessary to allow drawbacks for exports and other exemptions. A great deal of fraud resulted in spite of the numerous declarations, oaths and certificates which were necessary to be filled out.

Experience in the field as a revenue collector convinced me that only a portion of the miscellaneous sales taxes collected reached the government treasury. The difficulty was not, as I see it, in the complications involved, as much as in the attitude of all too many dealers who considered it not a serious breach of morals to " short-change " the government. A tax on gross or net sales would unquestionably be a less cumbersome method than the so-called nuisance taxes, but the prevalent attitude of mind which caused very considerable leaks in the collection of the miscellaneous taxes, and which accounts for much of the delinquency in the payment of income taxes, would make necessary a large and specialized force of auditors and adjusters for proper enforcement of a tax on aggregate sales of whatever kind. Unless made a major source of revenue it appears conclusive that the cost of collection, if properly administered, would be excessive. Unless rigidly enforced so as to prevent evasion the honest in business would be placed at an intolerably unfair disadvantage.

If levied as a tax applicable only to the gross sales of consumption goods of wholesalers and manufacturers (at present a favorite form of sales tax advocated in Congress) it would involve the difficulty of classifying sales for consumption and further processing as well as all the necessary adjustments which have been enumerated. A factor necessitating special provisions would be the direct sales by manufacturers to consumers. Just how successful Canada has been in preventing evasion and fraud is not determinable from facts available, but the problem in Canada is far more simple than would be that in the more highly developed and extensive industrial system of the United States.

One of the prime arguments of the proponents of taxation based on aggregate sales is the simplicity of administration. If it is added to the present tax system and not employed to replace some other form of taxation it certainly would not add to the simplicity of the present tax regimen, but would saddle upon us a new tax machine. The general sales tax would undoubtedly cause a very serious burden of administration. Dr. T. S. Adams has stated[7] that a tax if levied on business should be on industry which at some point is concentrated so that " it will not be necessary to run all over creation visiting, checking, inspecting and collecting from about 40,000 taxpayers, 30,000 of whom are not large enough to bother with." Professor Fairchild pays his respects to the administrative aspects of a general sales tax[8] in the conclusion that there is the choice either to make such a tax all-inclusive, in which case serious administrative costs and difficulties are faced, or else to make exemptions, in which case " you weaken and break down what foundation of principle there is for the universal gross turnover tax." So in his opinion, if the sales tax is added without sweeping away a good part of the present tax system, you will get no additional simplicity, but additional complications, and if imposition of the tax on the small concerns is avoided, all the argument which can be urged for the sales tax on the grounds of equity, is destroyed.

So long as human nature is as it is, the effective administration of a general sales tax or a tax on gross sales of certain factors of industry and commerce cannot be without a complicated and costly machinery for control. But granting, as the proponents of the sales tax in any of its forms contend, that the tax would be simple in administration, this in itself would be insufficient to warrant such a form of taxa-

[6] Sangster, Andrew, " Administrative Features of a Sales Tax," *Exporters' Review,* April 23, 1921.

[7] *Second Industrial Tax Conference Report No. 18,* p. 112.

[8] Fairchild, F. R., " The Case Against the Sales Tax," *National Tax Ass'n Bulletin,* June, 1921, p. 274.

tion. Simplicity is an important requirement, but it does not of itself justify a tax which is otherwise objectionable. Other phases of the tax to be considered will be taken up in due course.

FISCAL ASPECTS OF A SALES TAX

Proponents of a general sales tax tell us that such a source of revenue would afford a wider base, would be more tangible and flexible and less uncertain than a tax on profits. The argument for the superior dependabilty of a sales tax (gross sales tax) is based upon the premise that gross sales continue undiminished through a period of depression to a greater degree than is the case with profits. That profits decrease at a somewhat faster pace than the falling off in gross business is doubtless true, but that this offers insuperable difficulties in forecasting revenues from income taxes as compared with estimating the productivity of taxes on gross sales is not certain. In Great Britain the income tax has been the leading factor in the national budget for over a half-century and through periods of varying prosperity and depression. The annual forecasts of the revenue to be derived from that source have been more dependable than forecasts of the revenue to be derived from the sales taxes in France.[9]

The gross sales tax of France is broader than any similar tax proposed in this country, as it included a tax not only on commodity sales but on turnovers of all kinds, commissions, rents, fees, discounts and that on other non-trading activities, yet the yield has been a disappointment. Instead of the estimated monthly receipts of 460, 000,000 francs, the receipts during the first five months of operation were: September, 234,000,000; October, 205,000, 000; November, 203,000,000; December, 183,000,000; January, 151,000,000.[10] In March, 1921, it had dwindled to 147,000, 000 francs, or a little more than 35% of the original estimated receipts. Reports of M. Gason Jéze, who is a financial expert of the French government, made to Professor Seligman [11] state that while excuses were first made for the disappointing yield on the grounds of the newness of the tax, the facts are that the tax is most unpopular; that it has given rise to all sorts of administrative difficulties; that it is relatively the least lucrative of the French taxes; and that it is evaded on an immense scale. So great is the dissatisfaction that various Chambers of Commerce have petitioned for its repeal.

Estimates of the amount of revenue for the United States which could be raised by a general turnover tax on commodity sales at a rate of 1 per cent, vary from $1,700, 000,000 to as high as $6,720,000,000, that of the Tax Committee of the National Association of Manufacturers.[12] The first estimate is that by J. S. McCoy, government actuary, who based his figures on an estimated average turnover of 3½ times for each commodity and total taxable commodity sales for the country of approximately $75,000,000,000. The yield as estimated by Mr. McCoy would be greater than that of the income tax for the year 1919, which inclusive of both normal and surtaxes was $1,269,630,104. A tax levied upon the aggregate sales of manufacturers and wholesalers on commodities for consumption only is estimated to produce $253,500,000 annually.

Actual application of a tax on aggregate sales of commodities in any of its proposed forms might result, as in France, in disappointment either on account of gross evasion or interference with business on account of popular resistance to the tax. However, a sales tax levy is based on general turnovers of commodities and would undoubtedly result in an enormous yield. But the fiscal needs of the United States are not in such precarious condition as to necessitate disregard of elemental justice in incidence of the source of revenue or of other effects that are an undesirable possibility and which are considered in the next section.

ECONOMIC EFFECTS OF A TAX ON GROSS SALES [13]

The phase of the subject from which the most decisive conclusions may be drawn is the economic effects which may be expected

[9] Staub, Walter A., "Fallacies of the Sales Tax," *Journal of Accountancy*, Aug. 1921, p. 83.

[10] Comstock, Alzado, "Lessons from the French Turnover Tax," *Annalist*, Vol. 18, Dec. 12, 1921, p. 556.

[11] Testimony before the Senate Finance Committee, *Report of Internal Revenue Hearings*, 67th Congress, p. 461.

[12] *Internal Revenue Hearings Report*, 67th Congress, p. 230.

[13] Seligman, E. R. A., *Shifting and Incidence of Taxation.* Columbia University Press. pp. 219-254.

to result from the operation of a general tax on gross sales or its modified forms. Will all business be affected alike? Will the original taxpayers be able uniformly to shift all of the burden to the consumer? If paid by either, or both, will the imposition of the burden conform to the accepted principle of levy of a tax according to ability to pay?

The question of the final incidence of a tax on a gross sales is too involved to permit of dogmatic generalization. To ascertain at any particular time, or in any special case the extent to which the tax may be shifted involves consideration of all the conditions of price determination.

While many of the tax students are agreed that ultimately such a tax will be passed on to the consumer, within short periods of time or in individual cases the extent to which a tax can be shifted depends upon the nature of the demand, the control of the market, and in case of competitive industries, the laws of production which are operative.[14] Professor Carl C. Plehn is of the opinion that there is no certainty of the ultimate incidence of a gross sales tax. This appears to be the safest assertion which can be made regarding this question.

As proposed, a tax would be levied at a uniform rate on gross sales of commodities regardless of the nature of the commodities sold, the turnover of the goods or whether there was large, small or no profit in the transactions. As such, the tax would be regarded as an increase in the cost of production and all factors in industry and commerce subject to the tax will seek to recompense the outlay by a corresponding or greater increase in price. But price is not always determined either by costs or the will of the vendor. The degree to which the price can be increased in any given case depends upon the elasticity of the demand, the responsiveness of supply, control of the market and the production cost laws under which a commodity is produced.

While there are certain conditions under which part of a tax on aggregate sales may not be shifted, in practice under normal conditions the consumer will most generally bear the tax. In a declining market when losses are taken even by industrial and commercial factors in the most favorable positions, the tax would be less generally shifted in its entirety to the consumer.

While a tax on aggregate sales may be expected to result in an increase in price equal to or greater than the amount of the tax under normal conditions, there would undoubtedly be many instances of original taxpayers who would be forced to absorb a part or all of the tax imposed.[15]

THE INJUSTICE OF A GROSS SALES TAX WHEN NOT WHOLLY SHIFTED

The levy of the same rate of taxation on aggregate sales regardless of the percentage of profits and turnover of goods sold would work out very inequitably as between different vendors when any part of the tax had to be absorbed. For example, a dealer in jewelry may have for a year, gross sales of $30,000 with a gross profit of $15,000, while the gross profit of a grocer on the same volume of sales may be only half as much or less. So if each found it necessary to absorb half of the tax imposed, the grocer would be bearing double the burden of the jeweler. If the comparison were made on the basis of net profits, the inequality might be much greater. A gross sales tax as low as 1% would frequently be a large part of net profits. Data [16] submitted by Professor T. S. Adams indicate that a 1% gross sales tax is more than one-third of the net profit in dairying and meat packing; more than one-fourth in manufacture of millinery, artificial flowers, in the grocery trade and sale of some forms of leather goods; more than one-fifth of the net profits of wholesale lumber, coffee roasting, grist and flour milling, melting and refining manufacture of shoes, hats, caps and some silk goods. In so far as a gross sales tax cannot be shifted, it would therefore be levied on business with inequality and with no regard for ability to pay.

This particular criticism of a tax on gross sales is met by the argument that it is based on a false assumption in that the tax would be an increased cost, and in-

[14] Seligman, E. R. A., *Shifting and Incidence of Taxation.* Columbia University Press. pp. 219-254.

[15] King, Clyde L., "Taxation that Will Not Impair Business," *Annals of Amer. Acad.,* Vol. 97, p. 72.

[16] Adams, T. S., "The Case Against the Sales Tax," *National Tax Ass'n Bulletin,* June, 1921, p. 273.

creased costs are invariably shifted. Business of course cannot be carried on except at a profit, but the amount of profit is variable and, furthermore, without recourse to economic theory, the large number of business failures indicates beyond question that thousands of firms are unable to set their prices to cover costs. Especially is this true in a falling market, and there is no assurance that the gross sales tax cost could be more invariably passed than other costs. The relation of demand and supply determines price for short periods of time regardless of costs. The "writing off of inventories" during the past year or two has been a concrete illustration of the necessity under certain conditions of disregarding costs.

So it seems unquestionable that while normally a tax on gross sales would be shifted, yet there is a possibility of enforced absorption of the tax in many cases which would be grossly inequitable, and particularly as the taxpayers who were in a position least favorable to shifting the burden would tend to be those least able to pay.

THE ADVANTAGE TO INTEGRATED INDUSTRIES

Another serious objection to a general sales tax would be the differential advantage that would accrue to integrated industries.[17] In many self-contained industries there is no exchange or turnover from raw material until sale to the retailer or consumer. Such cases may be found in the steel, shoe, newsprint and other industries, while goods made by competitive enterprises would have many taxable turnovers before the finished articles reached the final consumer. The multiple process industry would therefore be in a position to undersell independent competitors by the amount of the tax from which the former would be exempt. Not only would this apply to industry but to commerce. The advantage to chain stores and mail-order houses would further threaten the existence of small dealers, since many of the chain stores and mail-order houses not only eliminate the wholesale transaction but manufacture goods from raw materials. The imposition of a general tax on gross sales would accordingly tend to give an unfair advantage to both vertical and horizontal combinations and monopolies in industry and commerce.

A tax on the aggregate sales of manufacturers and wholesalers only, or such a tax levied on retailers only, would eliminate the differential advantage to vertical combinations, but it would not solve the problem involving the taxation of sales of all business alike regardless of ability wholly to shift the tax.

Viewing a tax on gross sales in any of its forms from the point of view of equity to all the original taxpayers, such a method of raising revenue appears inadvisable.

VIEWED AS A CONSUMPTION TAX

Thus far, only indirect reference has been made to what is probably of the most general and vital concern — the equity of such a form of taxation in respect of its incidence on the final consumer. As far as the consumer is concerned it matters little how a tax on aggregate sales is levied provided the gross amount of the tax to be raised is the same. A general sales tax would offer greater opportunity for pyramiding than if the tax were levied on a limited number of factors, either the manufacturer and wholesaler, or the retailer. In any of these forms it would be a tax exacted from the consumer according to his consumption necessities.[18]

In the first place the increase of tax with the increase of the prices of necessities is without either a basis of reason or equity. A tax on consumption of necessities is *per se* not in accord with the principle that support should be given to the government in proportion to respective abilities, but rather a cold-blooded application of the Biblical canon that "to him that hath shall be given, but from him that hath not shall be taken away even that which he hath."

Some individuals are compelled by circumstances to spend all their earnings to maintain the most modest American standard of living, while others receive incomes that give them a wide margin over necessary spendings. By the operation of a general sales tax or any of its modified forms the more fortunate escape untaxed on part of their income while those least able to pay are taxed on entire earnings.

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[17] Spring, Samuel, "Adventures in Taxation," *Atlantic Monthly*, Vol. 127, p. 850.

[18] Ballantine, Arthur A., "The Sales Tax Not the Way Out," *Annals of Amer. Acad.*, Vol. 95, pp. 212-220.

There is not a proportional difference between the spendings of the rich man and that of the poor man for necessities. Therefore to the extent that expenditures involve necessities or even comforts, taxes on the basis of consumption impose a relatively greater burden on the poor. Furthermore, by the imposition of a tax which applies only to commodities and wares much of the non-productive expenditures of the wealthy would escape free—such expenditures, for example, as that for servants and other personal services, and acquisition of real property and travel abroad.

It is hardly necessary to submit evidence to support the assertion that the great majority of people who maintain respectable living conditions and give their children fair educational opportunities can save but a very small portion of their income even by rigid economy. The minority, on the other hand, able to save without sacrifice of necessities or comforts, would as the result of a general sales tax bear a relatively smaller burden.

The argument that this inequality would be justified by the fact that a consumption tax would place a premium on thrift cannot be accepted. Opposition to such a tenet has been publicly voiced.[19] "All business prosperity depends upon demand. Supply is conditioned by demand. But demand depends upon consumption. If you tax expenditure you restrict consumption; but if you curtail consumption you cut down production. All civilization rests upon the rise in the standard of life and growth of consumption. A tax, therefore, which will exempt savings and thus necessarily burden consumption runs counter to the development of social prosperity."

In summary, a tax levied on the basis of aggregate sales in any of its proposed forms is objectionable from the point of view of its final incidence in two outstanding respects. As a consumption tax it violates one of the cardinal principles of justice in taxation in not being a levy according to ability to pay, but rather in being what has been described as an upside-down progressive tax, imposing the heavier burden on those least able to pay. In the tendency of a tax on gross sales to restrict consumption and consequently to curtail production, the very opposite effect tends to be promoted from that which it is desirable to have during the period of reconstruction through which industry yet must pass.

[19] Testimony of Professor E. R. A. Seligman, *Internal Revenue Hearings Report,* 67th Congress, p. 472.

CONCLUSION

The various aspects of a general sales tax and the several modifications on the basis of a levy on gross sales have been analyzed from different points of view. Some basis for judgment has been given of the extent to which a tax on gross sales conforms to the principles of a satisfactory tax as generally accepted.

By way of recapitulation, these criteria are that a tax:

(1) Should yield adequate revenue for the purpose desired;
(2) Should effect as little harm as possible to the community;
(3) Should embody the administrative virtues of simplicity, certainty and convenience as to time of payment, and economy in collection;
(4) Should be as equal as possible not only among the initial taxpayers, but among all classes in a community with equality determined on a basis of ability to pay, or equality of sacrifice.

As has been indicated, there is little question but that with the base as broad as the sales of all commodities a general sales tax would, without drying up the source, net a tremendous income, sufficient perhaps to displace all direct taxation. A gross sales tax with its initial incidence on selected factors in business, as on manufacturers and wholesalers or retailers, could be expected at a rate two or three times as high as a general turnover tax rate to produce an equivalent amount. Fiscal adequacy is, however, practically the only unqualified point which can be made in favor of a tax on gross sales.

The harm that would tend to result to the community has been presented in the advantage that would accrue to integrated industries from a general sales tax levy. Whether as a general sales tax or in other forms, a tax on gross sales would operate unfairly wherever a part of the tax is not shifted entirely to consumer, in that advantage would be given to those whose business is transacted on higher gross profits than another. The general effect in so far

as one business or form of organization was favored as against another would be to curb equality of opportunity in business.

In respect of the third criterion of a satisfactory tax, a general sales tax or its suggested modifications cannot qualify. Any method of raising revenue which involves such a multitude of widely scattered original taxpayers with so many opportunities for evasion through erroneous exemptions, as was presented, to be properly applied must needs have a large administrative force to maintain proper checks. It would by no means be a model of simplicity. The cost of collecting such a tax if properly administered would unquestionably be so great that unless made the chief source of income it would not be justifiable. If adopted as a supplementary tax to the present system, and furthermore if properly administered, could not, as I believe, be economically levied. The convenience of payment is paradoxically one of the best arguments against it because it tends to ameliorate the inequality of burden of the tax. If included in the price to the consumer, a small tax on gross sales would unquestionably have the quality of "low visibility" so desirous to those who in contemplation of a tax are moved by motives of expediency rather than principle. The very fact of a tax being "hardly felt" is in the case of an unjust tax an additional reason for its condemnation. The introduction of even a very moderate tax on gross sales would be an entering wedge in the attempt to shift the burden of taxation downward. The sales tax is a direct attack on the principles involved in an income tax. The persistency with which an abominable tax even when "felt" can be maintained—take for example the general property tax — emphasizes the danger of the imposition of a "painless" tax which violates justice. Direct taxes that are felt compel the citizens' interest in government finances and tend to promote in the citizenship a more healthy concern in the affairs of government.

The last and most important indictment against a tax on gross sales of general commodities is its gross violation of the fourth rule.[20] This alone, that such a tax has a tendency to bear most heavily on those least able to bear it, should preclude any consideration of its adoption in any form except under such a dire extremity of necessity as cannot now be contemplated for this country.

[20] See p. 42, above.

DECISIONS AND RULINGS

EDITED BY A. E. HOLCOMB

Real Property — Fashionable Residence.—A New York taxpayer purchased a residence some years ago at a forced sale for $15,000 and subsequently made numerous improvements therein. The property was assessed at $30,000 and such assessment was resisted on the ground of overvaluation and inequality. The evidence showed that the residence was one of the finest in the tax district and that it could not be reproduced for $100,000. The court in upholding the assessment held that in a case of exceptional property, such as that in question, which was designed mainly for the personal use and gratification of the owner, it should be assessed at what it cost, where the purchase was of recent date and where no deterioration in value had taken place; and in other cases where there were no sales of similar property, the value might be derived from the opinion of well-informed persons, based upon the purposes for which such property was suitable, the location, character, and the probable amount it would bring in the hands of a prudent seller at liberty to fix the time and the conditions of the sale. As to equalization, it appeared that all other residential property was assessed on a similar basis, and the court held that this was sufficient to show that no inequality or discrimination existed.—*People ex rel. Sebring* v. *Dowd*, 194 N. Y. S. 3.

Assessment of Special Types of Buildings.—Under the Wisconsin statutes real property is required to be assessed at the value that can ordinarily be obtained therefor at private sale. In assessing a building of an insurance company con-

structed for its particular purposes the assessor took into consideration the average value of large office buildings in the tax district; the location; the cost of construction; and reproduction cost, and the purpose for which the building was used, and reached a value which reflected the intrinsic worth of the building to the company, but which was in excess of the price which could be obtained for the building at a sale. The court refused to uphold the assessment, on the ground that the property in question could only be assessed at its market value, which was the statutory rule, and that the various factors considered by the assessor could be taken into consideration only to the extent that they determined the sale value. In a dissenting opinion the position was taken that large buildings constructed by large corporations for specific purposes were not monuments of folly, but investments of worth, and that it was not unreasonable to assume that buildings of such type would be salable in the market at replacement cost.—*State ex rel. Northwestern Mutual Life Ins. Co.* v. *Wieher,* 188 N. W. 598.

Real Property — Tunnels under Highway. — The tunnels across a public street, joining the buildings of a corporation, were assessed by the City of New York. The company resisted the assessment, claiming that the structures were fixtures in land belonging to the city and therefore exempt from taxation. The tunnels were constructed under a revocable consent, under which the city could require the removal of the structures, upon sixty days' notice. The court held that under the consent, the tunnels remained the property of the corporation and were properly assessable to it. — *People ex rel. Fitts* v. *Cantor,* 195 N. Y. S. 377.

Mineral Rights—Lessor's Interest. —A Kentucky taxpayer leased the exclusive right of mining and shipping coal from his land to a coal company and received therefrom certain royalties. An omitted assessment was made against him for the value of the minerals in the land not included in his list. The taxpayer claimed that the lease in fact constituted a conveyance of the mineral products in the land to the coal company, and that he had no assessable interest therein, and that as he had listed for taxation the royalties received under the lease, the assessment resulted in his property being doubly taxed. The court upheld the assessment. It held that under the lease both the lessor and lessee had separate property interests which were assessable, and that while the taxing board had no right to assess the property in its entirety against the taxpayer, yet his interest was subject to a fair valuation, and that as the assessment was not unreasonable it could properly be called an assessment of the taxpayers' interest under the lease. It also held that there was no double taxation, since the royalties received under the lease constituted property wholly independent of the valuable rights of the taxpayer in the lease. — *Stepp* v. *Pike County Board of Commissioners,* 238 S. W. 408.

Assessment — Hunting Value. — An assessor in Washington, in assessing the land of a taxpayer, first placed on it 40% of the full value thereof found by him, and added the value of the land for hunting purposes at 100%. Thereafter he applied a horizontal increase of 30% to all real estate in the county. The assessment was resisted on the ground that both the horizontal raise and the inclusion of the value for hunting purposes was unauthorized. The court held that there was nothing in the record showing that the lands were assessed too high, except as to the hunting value, or that the assessor acted in a fraudulent or arbitrary manner, and refused to enjoin the collection of the tax. It also held that the hunting value might be included, but found that the assessor made a mistake in including it at 100%.—*Woodburn* v. *Skagin County,* 206 Pac. 834.

Unplatted Lands.—Certain unplatted land in a Michigan municipality was described on the assessment roll by its governmental subdivision, and as subject to all highways across the same. The owner tendered three-quarters of the total tax levied upon the assessments, which he claimed represented the tax on his land exclusive of the highways. Subsequently the remaining one-quarter tax was returned as delinquent, and a one-quarter interest in the land was sold for taxes. The owner brought suit to set aside the sale. The court refused to grant the relief re-

quested. It took judicial notice of the fact that unplatted lands in the corners of governmental subdivisions are usually assessed without reference to the streets, and held that the assessors in making the assessment took into consideration the fact that a part of the land was used for streets, and therefore the entire land was subject to the tax. The court also held that if the property owner was aggrieved by the assessment his remedy was to apply to the board of review for a correction of the assessment. — *Roberts* v. *Auditor General,* 187 N. W. 527.

Lease of Coal Lands. — An Illinois coal company which was engaged in mining coal from certain land under leases, was assessed for the coal rights in the land. It resisted the assessment, claiming that it did not own the fee to the land or the coal therein and that it merely had the right to remove coal. The court in upholding the assessment held that it was not material whether the company was the owner in fee of the coal in place, or whether it held some inferior interest therein, and that it was the owner of a mining right required to be separately taxed under the statutes.—*Big Creek Coal Company* v. *Tanner,* 135 N. E. 433.

Condemnation Proceedings as Affecting Assessment of the Lands Condemned.—In a suit to recover the remainder of an amount awarded plaintiff in a condemnation proceeding as compensation for real estate taken for street purposes, the principal question was whether the real estate in question was subject to taxation as private property on a specified date, or whether on that date it had become an integral part of a city system of streets. Subsequent to a verdict returned in a condemnation proceeding in which plaintiff was allowed compensation for such lands as were taken, plaintiff's real estate was assessed by the city for city taxes. The tax thereafter levied pursuant to such assessment and interest thereon, was retained by the city as due it, at the time payment was subsequently made for the compensation which had been awarded, and the suit involved recovery of such sum, plaintiff claiming that it had been divested of title by the judgment rendered in the condemnation proceedings.

The court held that there could be no divesting of the owner's title, through the exercise of the power of eminent domain, until actual payment had been made of the compensation awarded; that the condemnation proceeding and the judgment therein, although hampering plaintiff in the use of its property, did not deprive it of ownership, and its ownership gave rise to liability for the payment of the tax; that the subsequent payment of the award did not divest plaintiff of title as of the date of the judgment and relieve it from the obligation of payment of taxes; that when the city elected to take over the real estate and pay the compensation previously ascertained, it had the right to apply so much of the award as was necessary to satisfy the lien for taxes due from plaintiff. — *Jasper Land & Improvement Co.* v. *Kansas City,* 239 S. W. 864.

Assessment—Previous Year's Assessment Binding. — A landowner in Kentucky appealed from a judgment of a circuit court fixing the assessable value of land for taxes on the ground that such value was excessive, when compared with the reasonable market value of the land and with the assessment of similar land in the county. The court of appeals indicated that an assessment of land should be at the same percentage of fair cash values as other like lands, but held that where the lower court assumed, without objection by the parties, that the assessment for the year preceding, from which no appeal had been taken, was correct, and found that the lands of the county had increased in value during the year 41%, and increased the assessed value of the tract in controversy 30%, the finding must be considered as a finding of increase in assessable value, and not of cash value. The evidence showed that the cash value had increased only 10 to 20 per cent, and the assessment was sustained as the evidence showed the smaller percentage of increase on the land in controversy to be explainable because such land included relatively more rocky and hilly land than other lands in the district.—*Hillman Land & Iron Co.* v. *Commonwealth,* 239 S. W. 1041.

Domicile. — A Massachusetts city assessed the intangible personal property of an individual and such assessment was re-

sisted on the ground that he was not a taxable resident of such city. It appeared that he was domiciled in the city until the year preceding the assessment in question, when he rented part of a house in an adjoining town, notified the assessors thereof that he had taken up his residence there and wished to be assessed there upon his personal property, had his name placed upon the voting list, and notified the city of his change in residence. Subsequently he was assessed upon his personal property in the town and voted there. He retained the ownership of his house in the city, maintained an office in such house, had servants in constant attendance, and was an officer in several institutions there. It was shown that no assessment was made against him in the city subsequent to the assessment in question. The court upheld the trial court which found from the evidence that the domicile was in the city, and held that evidence of the failure of the city to impose personal property assessments for the years subsequent to the assessment in question was not admissible, under the rule that assessors are public officers, whose actions cannot be deemed in the nature of admissions binding the municipality.—*Rourke* v. *Hanchett,* 134 N. E. 355.

Authority of Tax Commission in North Carolina. — The original assessment of a North Carolina mill company was reduced several times by order of the state tax commission and finally fixed at a certain sum. Thereafter, the legislature, pursuant to the statute, adopted the report of the state tax commission, fixing the taxable value of all property in various counties in the state for the years 1920 to 1923 inclusive, and provided that such valuations might thereafter be changed only according to law. The commission subsequently sought to reduce the assessment in question still further and its authority to do so was questioned. The court held that the action of the legislature was final and that the act by which it adopted the valuations did not authorize the commission to modify or change the valuations so adopted. —*Cannon Mfg. Co.* v. *Cabarrus County Commissioners,* 112 S. E. 250.

Classification without Constitutional Authority.—Under the New Jersey statutes certain public utilities are required to pay a franchise tax at the rate of 5% upon their gross earnings, and an additional franchise tax upon gross earnings at the average tax rate in the state, which latter tax is in lieu of all state, county, school, and local taxation on all personal property, and all railways, tracks, and similar public utility property, apparatus or equipment. A traction company resisted the additional franchise tax, claiming that the statute violated the provision of the state constitution, requiring all property to be assessed for taxation under general laws by uniform rules according to true value, and that it was an attempt to tax personal property at other than its true value. The court upheld the tax, on the ground that it was a franchise tax, in the nature of a license tax which the legislature had the power to enact, and not a property tax; that it was within the province of the legislature to exempt certain classes of corporations from personal property taxation, and to treat them as a separate class, and that so long as those of that class were taxed according to uniform rules no exception could be taken.—*Salem & Pennsgrove Traction Co.* v. *State Board of Taxes and Assessments,* 117 Atl. 401.

Equality — Subdivision of Tax Districts.—Suit was brought to restrain the levy and collection of a tax levied by an independent school district in Texas on the ground that the act creating such district was unconstitutional for various reasons. Among other things, it was contended that the act provided for unequal taxation by reason of the fact that portions of other districts which had been incorporated into the independent district would be required to pay not only the tax imposed by the independent district but also taxes voted prior to the creation of the independent district in the districts to which they formerly belonged. The court declared the contention unsound, and held that the act by taking certain portions out of other districts and incorporating them into the independent district, automatically released such portions from any taxes thereafter levied upon the districts of which they were no longer parts and that such release was not repugnant to the constitution of the state.—*Hill et al.* v. *Smithville Independent School Dist. et al.,* 239 S. W. 987.

Uniformity—Limitation on Levy.—In a county tax levy in Georgia containing various items one of them exceeded the constitutional rate limitation. All of the taxpayers except a railroad company paid the full tax under the levy. The railroad company paid all taxes except that part of the levy which exceeded the constitutional rate. Subsequently in attempting to make the tax levy legal it was amended and all items were relevied, the amount of the illegal item in excess of the constitutional limitation being included in another item, not governed by a constitutional limitation, and provision was made for a credit of the taxes paid under the first levy. The court held that the amended levy was illegal, because it was in effect a new levy against a single taxpayer, which was in violation of the uniformity clause of the constitution.—*Wright* v. *Southern Railway Co.,* 112 S. E. 171.

Savings Banks in Indiana. — The State Board of Tax Commissioners of Indiana assessed the surplus and undivided profits of a savings bank. The assessment was resisted by the bank, which claimed that the board had no authority to make the same. Under the statutes the surplus and undivided profits of savings banks are required to be assessed in the same manner as the surplus and undivided profits of state and national banks. There is no express statutory provision for the taxation of the surplus and undivided profits of state and national banks, but the capital stock of such banks is required to be assessed by the state board, which must take into consideration the capital, surplus, and undivided profits. The board construed the statutes to give it the authority to make the assessment in question. The court held that the power to assess savings banks was expressly delegated to the county board of review, and that the statutes could not be construed to give the state board authority to assess the capital stock and surplus of savings banks.—*Doyle* v. *Lafayette Savings Bank,* 135 N. E. 181.

Mortgage Recording Fee — Refunding Mortgage.—A corporation executed a mortgage which contained a refunding provision to secure bonds amounting to $95, 000,000 and paid the New York state mortgage tax thereon. Subsequently the corporation under the provisions of the mortgage issued three series of bonds aggregating $21,558,000, and the proceeds were used to discharge an equal amount of bonds originally issued under the mortgage. The state sought to collect the mortgage tax on the subsequent bond issues. The court held that the tax was on the "principal indebtedness", and that the substitution of one principal indebtedness in place of the other resulted in the creation of a new debt, equally subject to the mortgage tax. The court remarked that the parties to a mortgage might not, by inserting in the mortgage, provisions constituting such instrument a security for a new indebtedness, evade the provisions of the mortgage tax law.—*People* v. *Boston & Maine Railroad,* 195 N. Y. S. 402.

Mortgages—Nebraska Law.—When a Nebraska landowner mortgaged his land, the statutes provided that mortgages should be assessed and taxed to the mortgagee, and the excess in the value of the mortgaged real estate above the mortgage should be taxed to the mortgagor. Subsequently the statutes were amended, and it is now provided that a mortgage shall be assessed as real estate to the mortgagee unless such mortgagee is exempt from taxation thereon. The mortgage in question was exempt in the hands of the mortgagee in question, and the full value of the real estate was assessed and taxed to the mortgagor, who brought mandamus proceedings to compel the separate assessment of the value of his interest in the real estate above the mortgage, contending that the amendment changing the taxable status of mortgages impaired the obligation of his contract. The court refused to grant the relief requested, holding that taxes are positive acts of the government, not founded on contract and not dependent for their validity upon the individual consent of the inhabitants.—*State ex rel. Spelts* v. *Rowe, County Clerk,* 188 N. W. 107.

Exemption—Public Property. — In a proceeding to obtain an order for the sale of land belonging to an Illinois sanitary district on account of delinquent taxes, the district claimed that the property was being used solely and exclusively for public purposes and was exempt from taxation. It appeared that the assessment was based

upon a list furnished by the district, showing the land in question to be rented to private individuals. In the proceeding the district alleged that the parties who rented the property as shown in the list had not taken possession of the property and had paid no rent, and that therefore such property must be treated as used exclusively for public purposes. The court held that the district, by filing the list in question, was estopped from claiming that the property was exempt. — *People ex rel. Carr, County Collector* v. *Sanitary District of Chicago,* 134 N. E. 733.

EXEMPTION — CONSTITUTIONAL PROVISION PREVAILS OVER PRIOR STATUTE.—The Ohio court held that real estate owned by a fraternal order known as the Eagles was not exempt from taxation, since the order was not an institution organized exclusively for charitable purposes, as required under the constitutional provision adopted in 1912. The order based its claim on a statute enacted prior to the constitutional enactment, which exempted real estate owned by such an order, and contended that the constitutional provision must be construed in connection with the statutes existing at the time of its enactment. The court held that the constitution was the superior law, superseding existing statutes in conflict therewith. — *Wilson* v. *Licking Aerie No. 387 F. O. E.,* 135 N. E. 545.

EXEMPTION — BUILDINGS CONSTRUCTED FOR ANOTHER. — A New Hampshire town voted to exempt from taxation certain mills and machinery of two companies to be erected by them. The one company constructed certain mill buildings as trustees for the other and transferred the same to it. The town assessed the property, claiming that the exemption did not pass with the transfer of the property from the one to the other. The court abated the tax, holding that the mill was in fact constructed for the company that was assessed and whose property was expressly exempted by the vote of the town.

The court also held that where the failure of a taxpayer to file an inventory of his property was due to accident or mistake, such failure would not bar his right to maintain a proceeding for the abatement of the tax levied on his property.

In disposing of the objection of the town that no application had been made to the selectmen for an abatement of the tax, the court said that under the statute the selectmen could have made the abatement upon the commencement of the suit if they had seen fit to do so. — *Bean & Symonds Co.* v. *Town of Jaffrey,* 117 Atl. 12.

EXEMPTION — VETERANS. — Under the Maine statutes it is provided that the estates of veterans of the three last wars of the United States, not exceeding $5,000, shall be exempt from taxation, after the veteran reaches the age of seventy. A veteran having an estate in excess of $5,000 was taxed on his whole estate, and he resisted the tax thereon, claiming that he was taxable only to the extent that the estate exceeded $5,000. The court held that the statute was intended only to apply to estates which did not exceed $5,000.— *Inhabitants of Mechanics Falls* v. *Millett,* 117 Atl. 93.

EXEMPTION — CONSTITUTION VERSUS STATUTE.—In an Alabama case the question presented was whether or not the provisions of the Revenue Acts purporting to exempt state banking corporations from the payment of a franchise tax were in conflict with the constitution, providing for the payment of a franchise tax by corporations organized under the laws of that state other than strictly benevolent, educational, or religious corporations. The court held that the provision of the constitution made it mandatory upon the legislature to levy a franchise tax on all domestic corporations, except those expressly exempted; that a positive unambiguous direction in the constitution as to what property should be exempt implied a prohibition against the exemption of any other property; and no person or property might be exempted, unless the intention to exempt clearly appeared; that where the language used was plain and unambiguous, search for purpose or intention to exempt could be initiated; that the attempt to exempt domestic banking corporations from the payment of a franchise tax was unconstitutional and ineffectual under the constitutional provisions above referred to; that the clause imposing the franchise tax on domestic corporations in general should be given effect, notwithstanding the exemption, for the reason that it was the legisla-

tive execution of a constitutional mandate, and it must be presumed that the legislature intended that it should operate nevertheless according to the force of that mandate.—*State ex rel. Smith, Atty. Gen'l,* v. *Elba Bank & Trust Co.,* 91 So. 917.

PUBLIC PROPERTY—AUTOMOBILES—EXEMPTION. — A California municipal water district sought to compel the state to issue license plates to it for its automobiles, without the payment of the statutory fee. The water district claimed exemption from the fee, under the doctrine that statutes imposing taxes do not apply to public agencies or public property, unless such intent is clearly expressed in the statute. The statute contained a provision exempting vehicles from the tax not used for the conveyance of persons for hire, pleasure or business, or for the transportation of freight. The court held that the water district did not use its vehicles for business or hire in the sense contemplated by the statute and that the exemption applied to it.—*Marin Municipal Water District* v. *Chenu,* 207 Pac. 251.

PUBLIC PROPERTY—AUTOMOBILES. — An employee of an Oregon municipality was convicted of driving an automobile belonging to another municipality, without proper license plates. The municipality owning the automobile contended that the fee exacted for licensing motor vehicles was a tax on property and not a license, and that all municipal property used for public purposes was exempt from taxation under the statutes. In the statute regulating motor vehicles and imposing the tax, fire engines were the only municipal property exempted from its provision. The court held that as the constitution did not prohibit the taxation of property used for municipal purposes, such property was taxable, and as the statute did not exempt municipal property, other than fire engines, it upheld the tax.—*State* v. *Preston,* 206 Pac. 304.

PUBLIC USE — FIREMEN'S PENSION FUND. — A suit was instituted in Alabama by a fire insurance company to recover a percentage of the gross premiums from its business in the city of Montgomery, which it had paid to the city, pursuant to an act requiring each such company doing business in the city to pay annually a sum to the firemen's pension and relief fund. It was contended that the act was unconstitutional, in that it undertook to create a "pension system" pure and simple, and to grant to members of the fire department extra fees or allowances, after services had been rendered. The court held that since the contract of service was not for a fixed term, but was terminable at the will of either party, the salary could be changed at any time either by law or by mutual contract, without violating the constitutional provision prohibiting extra fees or allowances after services had been rendered or contract made. The creation of the fund and the machinery for carrying out the provisions thereof were held governmental and not in violation of the constitutional provision prohibiting the legislature from authorizing a city to lend its credit or grant public money to any individual, association, or corporation. The court held that the levy of the tax or license above referred to was for public and not for private use. — *Cobbs, City Treasurer,* v. *Home Insurance Co. of New York,* 91 So. 627.

PUBLIC LANDS—PATENTEE.—In a Mississippi case the court held that where an entryman on public land had not received a final receipt or a patent to such land, it was not taxable, because the title to the land was in the United States Government, and that an assessment and sale of such land for taxes was void for want of power in the state to tax it. — *Lyon Co. et al.* v. *Ratliff,* 92 So. 229.

LICENSE—PEDDLER.—An ordinance of a Michigan municipality required each street vendor, huckster, or peddler engaged in peddling food or other products not manufactured by himself, to procure a license, and the mayor was authorized to issue such license to any resident of the city, a citizen of the United States, or who had declared his intention to become such, under certain restrictions. The license fees varied from $1 to $25, annually, depending upon whether or not vehicles were used. Peddlers were required to wear badges and carry photographs of themselves. The ordinance was resisted, on the ground that the license fee was excessive; that it delegated arbitrary power to administrative officials; that it was discriminatory, and

not of general and impartial operation; and that the regulations were oppressive and unreasonable. The court, in upholding the ordinance held that the annual license fees were not excessive; that the mayor was not delegated with uncontrollable licensing power, since his discretion to grant or refuse the license was limited by the ordinance; that the limiting of the ordinance to those engaged in vending food, or other products not manufactured by themselves, was not discrimination, as the classification was a proper one under the police power; and that the regulations pertaining to badges and photographs were not oppressive, since such requirements were within the legitimate scope of an ordinance which involved the health and safety of the people of the municipality.—*Hughes et al.* v. *City of Detroit,* 187 N. W. 530.

License—Motor Vehicles—Reasonableness of Regulations. — An ordinance of a Michigan municipality regulating the operation of taxicabs, imposing a license fees of $25 for the first car and $10 for the others and giving the city commission the power to determine whether the person making the application was a proper person to receive a license was attacked on the ground that it conferred upon the city officials the arbitrary power to grant and refuse licenses, and that the fees were unjust, unreasonable and discriminating and not for the purpose of regulation but for revenue. The court in upholding the ordinance stated the following rule: when the municipal regulation affects the private right of the public to use the highways the requirements must be so specifically pointed out in the ordinance as to permit all applicants who comply therewith to secure a license as a matter of right and an arbitrary discretion to grant or refuse may not be conferred: when the subject matter sought to be controlled is one to which the applicant has a permissive right only, such as the right to use the highway for private gain, the validity of the provisions under which the right may be obtained cannot be questioned. It also held that the fees were not so large as to be unjust, unreasonable and discriminatory.—*Melconian et al.* v. *City of Grand Rapids,* 188 N. W. 521.

License—Classification of a Street Railroad.—A revenue agent in Mississippi instituted a suit to recover privilege taxes alleged to be due from a company operating an interurban railroad, connecting and passing through several towns and cities in that state. The recovery sought was the difference between the privilege tax which had been paid by the company, classed as a third-class railroad and one imposed for operating a street railroad, together with penalty for failure to pay the tax during the month in which it became due.

The court held that that portion of the road which traversed the streets of a city or town and performed therein the functions of a street railroad was to be classed as such, but that portion which did not perform such functions was not and could not be so classed; that where only a part of the railroad was a street railroad, the privilege tax due was only on that part.

It held further that notwithstanding the company's good faith in procuring a wrong license it was liable to penalty for failure to pay the proper privilege tax and to procure the necessary license during the month. —*Gulfport & Mississippi Coast Traction Co.* v. *Robertson, State Revenue Agent,* 92 So. 231.

License—Change in Amount During Year—Unreasonable Tax.—A Georgia municipality enacted an ordinance imposing an annual license tax on ice dealers of $300 and an additional tax of $100 for each wagon used. The license tax in force when such enactment was made was $25 and the license year had not yet expired. An ice dealer brought suit to enjoin the enforcement of the tax, claiming that the municipality had no authority to change the tax during the license year and that the tax was unreasonable and oppressive. The dealer showed that the majority of the members of the city council which enacted the ordinance were members of an ice association engaged in selling ice in the municipality; that the tax amounted to 30% of his net income, and that all other ice dealers, but one, had been driven out of business because of the amount of the tax. The court held that the municipality had the power to increase the license tax during the license year but enjoined its enforcement because it was clearly unrea-

sonable and excessive.—*Williams* v. *Mayor and Council of Waynesboro,* 111 S. E. 47.

License—Moving Vans. — A Missouri municipality enacted an ordinance requiring persons or corporations engaged in moving household and office furniture to obtain a license and furnish a bond for $2,000. The ordinance was resisted on the ground that the municipality had no authority under its charter to impose a license upon the business in question and that the requirement to furnish a bond was unreasonable and oppressive and not necessary for the general welfare. The court upheld the ordinance, holding that the municipality had the general power under its charter to require the license and that the requirement of a bond was not unreasonable or oppressive, as the amount was clearly reasonable and its requirement was warranted by the conditions prevailing in the municipality.—*Mike Benniger Moving Co.* v. *O'Brien,* 240 S. W. 481.

County Road Tax Expended by State Officials Remains a County Tax.— New Mexico accepted the provisions of the " Federal Aid Road Act " and enacted a statute authorizing and directing the board of county commissioners of several counties to levy and collect a three-mill tax on all taxable property. The proceeds from such levy were required to be paid into the state treasury, and such funds were required to be used under the direction of the state highway commissioner, together with the federal aid funds, for the construction and improvement of public highways in various counties in proportion to the funds contributed by each. It was admitted that if the tax imposed was a state tax, the constitutional limitation was exceeded. The court held that the roads constructed under the statute remained county improvements and the funds realized therefrom were in substance county funds, and that the tax was a county, and not a state tax, and not within the constitutional limitation. — *State* v. *Red River Valley Co.,* 206 Pac. 695.

Inheritance, State — Gifts in Contemplation of Death—Wisconsin Act. —The Wisconsin inheritance tax statute provides that all transfers made within six years of the death of the grantor, of a material part of his estate, or in the nature of a final distribution thereof, shall be construed to be made in contemplation of death and are made taxable. The decedent within six years of his death made numerous gifts of cash and securities to his five children, varying in amount from $500 to $50,000 each, the total gifts amounting to about one-half of his estate. The court held that two gifts amounting to $5,000 and $50,000 each constituted not only a material part of the estate but were in the nature of a final distribution of the estate and were taxable.

The court was urged by the attorney general to establish some definite rule for the determination of what constitutes " a material part of an estate ", but it refused to do this, on the theory that as the legislature had not established a rule that would operate with mathematical certainty it could not be charged with the duty of laying down such a rule.

In passing upon the question whether the value of certain of the securities transferred should be taken as of the date of the transfer, or of the death of the decedent, the court held that the value existing at the time of the death should govern.— *State* v. *Stevens,* 188 N. W. 484.

Inheritance, State—Estates by Entirety — Retroactive Statute. — In a New York inheritance tax case certain real estate was conveyed to husband and wife in 1908 by entirety. In 1916 a statute was enacted which made the right of the survivor to the immediate ownership and enjoyment of the property, held by entirety, subject to the tax. The state sought to enforce the tax, the husband having died since the enactment of the 1916 statute. The court refused to uphold the tax, holding that whatever power the legislature might have with regard to such estates later created, it did not extend to those already vested before the adoption of the statute. — *In re Lyons Estate,* 135 N. E. 247. See also 190 N. Y. Supp. 938.

State Tax Collected by County— Poll Taxes. — Under a Washington statute a poll tax was imposed on all persons in the state, with certain exceptions, and the various county treasurers were required to collect the same and remit four-fifths of it to the state treasurer for the general

state fund, and retain one-fifth for the general expenses of their respective counties. The constitutionality of the statute was attacked on the ground that the legislature had no power to impose taxes upon counties or municipal corporations or the inhabitants thereof, for county or municipal purposes, but was limited to the granting of authority to the corporate authorities to assess and collect taxes for county or municipal purposes, and that under the constitution taxation was limited to the taxation of property in proportion to its value, at uniform and equal rates of assessment. The court upheld the tax, on the ground that it did not appear that the tax was imposed for county purposes either in whole or in part, but that the legislature, in providing a new source of state revenue, intended to make some provision to take care of the expenses incurred by the counties in collecting and enforcing the tax, and that the constitution did not contain any provision prohibiting the imposition of a poll tax, either directly or indirectly, hence by virtue of its sovereignty the state had the power to tax all persons or property within its jurisdiction, except as limited by the constitution.—*Nipges* v. *Thornton, County Treasurer,* 206 Pac. 17.

Taxes Levied to Provide Sinking Fund on Unsold Bonds. — A Georgia taxpayer sought to enjoin the collection of certain taxes levied to provide a sinking fund for the redemption of certain bonds and an interest fund.. It appeared that although the bonds were legally authorized the county was unable to dispose of them because of existing economic conditions. The taxpayer contended that as no part of the bonds were issued they could not be considered a debt against the county for which taxes could be levied. The court held that the taxes levied for the interest fund were illegal as there was no interest accruing during the period that the bonds remained unissued, hence the county was not required to raise such interest. It upheld the tax levied for the sinking fund, on the theory that the bonds would be issued, and the county would be required to discharge the principal when it fell due. —*Mitchell County et al.* v. *Phillips,* 111 S. E. 374.

Relief and Review—Failure to List in Massachusetts Fatal.—A Massachusetts taxpayer failed to list his taxable property. Thereafter an omitted assessment was made, which included property not subject to taxation, and the tax imposed thereon was resisted by him. The court held that as the taxpayer had failed to list his property he was deprived of any right of abatement for the part of the tax assessed against the non-taxable property. —*Bartlett, Tax Collector,* v. *Tufts,* 134 N. E. 630.

Motor Vehicles—Sale of Gasoline. —An Arkansas case involved the validity of a statute providing for the collection of a tax upon the sale of gasoline, kerosene or other products to be used by the purchaser thereof in the propelling of motor vehicles, using combustible type engines over the highways. The validity of the tax was challenged on the ground that it amounted to a property tax on gasoline and the other commodities and was void, because in violation of the uniformity clause of the constitution of the state; that the statute could not be interpreted as imposing a tax on automobiles used on the public highways, as such a tax was imposed under another statute, and that a statute amending the former one and increasing the amount of taxes was passed and approved only a few days before the enactment of the statute under consideration; that the legislature had no power to impose it as a state tax for revenue purposes; that the statute, treating it as imposing a privilege tax, was arbitrary and unreasonable in that it discriminated against the users of certain kinds of cars, while exempting users of other kinds of cars, and that it also exempted cars propelled by the use of gasoline and not purchased in the state; that the due process clause of the constitution of the state and of the United States was violated by the requirement laid upon dealers in gasoline to collect and pay the tax; that the law was vague and uncertain and incapable of enforcement.

The court sustained the validity of the statute, holding that it did not impose a property tax, but a tax upon the privilege of using automobiles on the public highway; that it was not unreasonable to suppose that, by one statute, the lawmakers

intended to impose a minimum privilege tax, laid according to the capacity of the car, and by the statute under consideration, to impose an additional tax laid according to the extent of the use of the car on the public highway; that the constitution did not prohibit taxation for state purposes for the use of the public roads; that the tax was not discriminatory or unreasonable and that mere incidental discrimination or opportunities for evasion did not affect its validity; that the statute was not invalid as violating the due process clause of the state and federal constitutions, for the dealer had ample opportunity to reimburse himself in advance, by the collection of the tax before the commodity was delivered; that the statute was not invalid for uncertainty.—*Standard Oil Co.* v. *Brodie et al.*, 239 S. W. 753.

Payment and Recovery — "Assessment". — A non-resident of Arkansas owned land in that state on which he paid a special non-resident land tax of ten cents per acre. This acreage tax was levied pursuant to a special act of 1917, regulating the working of public roads and providing a tax therefor, which act had subsequently been held unconstitutional. A petition for refund of the tax so paid having been disallowed, action was brought for its recovery, on the ground that the tax had been illegally collected. The court held that as the tax had not been collected by an "assessment", which is an official listing of persons and property, with an estimate of the property of each, the tax could not be refunded in a proceeding under § 10180 of Crawford & Moses' Digest providing for the refunding of taxes erroneously "assessed".—*Walton* v. *Arkansas County,* 239 S. W. 1054.

Income, Federal—Income of Trusts. —A trustee held a fund in trust to pay the income to a hospital, subject to the payment of certain annuities. In the course of time all the annuitants died except one, whereupon the trustee transferred the whole fund to the hospital as a loan, the hospital agreeing to pay interest enough to satisfy the one remaining annuity and the expenses of the trust. The hospital thus actually received the full benefit of the income from the fund, reduced only by one annuity. The internal revenue collector assessed the trustee for the income of the estate and the tax was paid and suit brought to recover.

The court held that the fund was actually vested in the hospital, which really received the benefit of the income, subject to the annuity; that as the hospital was admittedly exempt from income tax, the exemption should be given effect under the circumstances; that the technical formality of the trust which did not prevent the hospital from really enjoying the income, should not be allowed to defeat the beneficent purpose of Congress. — *Lederer* v. *Stockton,* U. S. Sup. Ct., Oct. 16, 1922. See *Bul.* VI, 153.

Income, State—Disposition of Yield. —In adjusting local finances, upon the substitution of the income tax in Massachusetts, various provisions were made. One of these was the act of 1919, ch. 363, under which the state treasurer was directed to set aside and pay over to the cities and towns, from the proceeds of the income tax, a sum sufficient to reimburse them for specified increases of salaries of school teachers, supervisors, superintendents and the like. A taxpayer, therefore, brought mandamus proceedings to prevent this paying over, claiming that the act was unconstitutional, because imposing a public charge upon a special class of property and upon persons who were not specially benefited, in violation of the due process clause of the Fourteenth Amendment. He also sought to emphasize his claim by coupling up with it an act passed at the same session, increasing the income tax by one per cent.

The court affirmed the state court in holding the income tax a general tax; that the funds derived became a part of the general funds of the state and could be expended for education and that there was no such appropriation as to make the tax a special tax for a special purpose or use. —*Knights* v. *Jackson, Treasurer,* U. S. Sup. Ct., Oct. 16, 1922. See *Bul.* VI, 282.

Inheritance, State — Tenants by Entirety — Pensions — Deduction of Federal Tax.—The appellate division of the New York supreme court has reviewed the decision of the surrogate in the Carnegie estate, reported in *Bul.* VII, 225. It overrules the surrogate's holding that

Mrs. Carnegie as surviving tenant of an estate by the entirety should pay a tax on one-half of the realty, as upon a transfer, and holds that the death of Mr Carnegie merely released the property to his wife and did not create a transfer taxable at the time the deeds were made in 1898 and 1899, under the law as it then stood.

The court affirms the surrogate's holding that no part of the fund established to pay private pensioners was taxable, even though the deed of trust contained a power of revocation as to a part of the fund.

The court also affirms the surrogate's holding that the federal estate tax is not deductible in determining the state tax being bound, as it says, to follow the decision of the court of appeals "however persuasive may be the reasoning for the adoption of a different rule and the weight of the authorities cited from other states." It is stated that the case will be carried to the United States Supreme Court on this question.—*In re Carnegie's Estate,* N. Y. Sup. Ct., App. Div., 1st Dep., Nov. 3, 1922.

INHERITANCE, STATE — GIFTS INTER VIVOS. — In a California case, the court held that a gift from parent to child made in 1908 vested title in the child at that time even though not intended to take effect in possession or enjoyment until after the death of the parent. The transfer was complete, and the rate of tax in force at the time of the transfer could not thereafter be changed by the legislature; that where the child received an additional transfer of property at the death of the parent in 1916, when the law was materially different from that existing at the time of the first transfer, the value of the two transfers could not be combined for the purpose of ascertaining the tax, but each transfer must be treated as a separate taxable unit, and the tax based upon the statute in force at the time each was made.—*In re Potter's Estate,* 204 Pac. 826.

INHERITANCE, STATE—FOREIGN CHARITABLE CORPORATION. — In Illinois it was held that a bequest to a foreign charitable corporation was subject to the inheritance tax, even though domestic charitable corporations were exempt. The court said that there was no constitutional prohibition against such taxation and that foreign corporations could not claim the same privileges within the state, as were accorded to domestic corporations. — *People* v. *Woman's Home Missionary Soc. of M. E. Church,* 135 N. E. 749.

BANKS—DEPRECIATION. — For the purpose of assessment a bank in Iowa furnished to the township assessor a statement pursuant to the requirements of a law in that state. On its own motion the bank included in such statement an item of depreciation for "slow, doubtful, and bad paper", estimated at three per cent of its bills receivable and claimed a deduction of such amount in reaching the value of its shares of stock. This claim was recognized by the assessor, the result being to leave the bank's capital with no assessable value. The county auditor corrected the assessment by eliminating the item of depreciation which had been allowed as a deduction by the assessor.

The court was thereupon required to decide whether the township assessor was justified in recognizing the item of alleged depreciation and in deducting the same in reaching the assessable value of the bank's capital based upon the statutory items of capital, surplus and undivided profits, and if not, whether the county auditor had power to correct the assessment by eliminating such item of depreciation.

As to the first question, the court held that the bank was not entitled to the item of depreciation claimed, as it had not charged off its bad paper upon its books, and the assessor had no power to approve the deduction. As to the second question, the court sustained the action of the county auditor in striking out the deduction, on the theory that the action of the assessor was an error within the meaning of the statute. — *Avoca State Bank* v. *Burke, County Auditor,* 188 N. W. 675.

BANKS—EQUALITY. — An assessment of an Idaho bank was resisted on a number of grounds. In upholding the tax the court held that statutes requiring all property to be assessed at actual value were secondary to the constitutional mandate of equality in taxation; that the bank property should be deducted from the total value of the stock, not at its assessed value but at the value of the stock which it represents; that the price paid for a few iso-

lated shares of the stock was not a fair measure of the value of the entire stock; that inequality might be safely deduced from proof covering 76% of all of the property in the county; that the consideration expressed in a deed did not carry with it such a presumption as would justify its admission as evidence; and that farm loan appraisals, in the absence of evidence that they were incorrect, were admissible as evidence of the value of property so appraised, since the officials charged with the duty of making such appraisals had no motive to misrepresent value.—*Washington County* v. *First National Bank of Weiser,* 206 Pac. 1054.

BANKS — DEDUCTION OF REAL ESTATE. —A county auditor in Iowa corrected the assessment of a bank's capital as returned and filed by a township assessor, by striking out of the said return of assessment a deduction for the amount of capital actually invested by the bank in real estate which had been allowed by the assessor, and substituting the amount at which such real estate was assessed. The court held that the township assessor was correct, and that the change made by the county auditor was erroneous. — *Citizen's State Bank of Oakland* v. *Burke, County Auditor,* 188 N. W. 677.

EXEMPTION—RELIGIOUS USE.—A Wisconsin corporation organized to publish and distribute religious matter to members of a church organization, which paid over to an ecclesiastical parent corporation all profits derived from its business, brought action to recover taxes levied by a city against its real and personal property which it claimed was exempt from taxation, because it was not organized for profit, and was maintained for educational and benevolent purposes. The court sustained this position and held that although the corporation used a small part of its floor space for certain sample church articles and did a very small amount of commercial printing as a matter of convenience for its regular customers, the property had not thereby been diverted from its primary use and the departure was so slight as to be negligible, and therefore should be disregarded.—*Northwestern Pub. House* v. *City of Milwaukee,* 188 N. W. 636.

EXEMPTION — PUBLIC PROPERTY. — A water company was organized to supply an Illinois municipality with water, and it agreed to apply the profits remaining after the payment of expenses and a six per cent dividend on its stock, to the reduction of its outstanding stock. When all the stock was redeemed the water system was to become the property of the municipality. An adjoining county assessed the property of the water company located therein. The company claimed that its land constituted public grounds used for a public purpose and its machinery and fixtures belonged to a municipality and were used exclusively for conveying water to it, and that it was exempt from taxation. The court sustained the assessment, holding that the property was that of a private corporation and not of a municipality.—*Roodhouse Water Corporation* v. *Board of Review of Scott County,* 135 N. E. 708.

EXEMPTION — BAKERY AS A MANUFACTURING ESTABLISHMENT.—The Louisiana court held that the business of making and baking bread, in an establishment in which the various processes and manipulations were conducted by machinery, was that of a manufacturer, and was therefore within the constitutional provision exempting manufacturers from license tax.—*State* v. *Lanasa,* 92 So. 306.

GENERAL LAWS PRECLUDING SPECIAL LAWS.—A Georgia municipality, pursuant to a charter amendment, repaved its streets and assessed the full cost thereof on the abutting property owners. At the time of the amendmnet there was a general statute in existence which authorized municipalities to repave their streets upon the same conditions that were in force when the original paving was laid In the municipality in question, two-thirds of the cost of the original paving had been assessed to the abutting owners, under the statutes then existing. The state constitutional provision prohibiting the enactment of special laws for purposes for which provision had been made by general laws was invoked in resisting the assessment, and the court enjoined the assessment on this ground.

Upon a rehearing, attention was called to a curative statute enacted by the legislature validating the assessment as made

by the city. The court held that the curative act was unconstitutional because it created a new obligation and liability in respect to a transaction already past.—*Wilkins et al.* v. *Mayor and Alderman of Savannah,* 111 S. E. 42.

Special Assessments — Leasehold and Improvements.—An educational institution in Illinois resisted a benefit assessment on its leasehold and improvements in land owned by a city, claiming that such property was exempt; that leaseholds were not real estate, and that the assessment was discriminatory, because leaseholds in lands, the fee of which was held by private owners, were not separately assessed. The court sustained the assessment, holding that the leasehold and improvements were not public lands, and that the institution had agreed in its lease to pay all taxes and assessments; that under the constitution and statutes the power to assess contiguous property for benefits was not limited to such property as was regarded in law as real estate but all fixed and immovable property, receiving substantial benefits from improvements might be assessed therefor; and that no discrimination existed since the assessment of private land in which leaseholds were granted, included all of the various interests therein.—*City of Chicago* v. *University of Chicago,* 134 N. E. 723.

Assessment — Biennial Assessment Not a Denial of Due Process.—Under the Alabama statutes real estate is assessed biennially by the county tax adjusters, unless a change in value takes place caused by destruction of buildings, removal of timber, depletion of minerals or new construction. The state tax commission ruled that an assessment could only be changed in the second year of the biennial period where a change in value was caused by any one of the special grounds above stated. Owing to a heavy general decrease in land values a taxpayer sought to compel the state tax commission by mandamus to order a general revaluation. This action was based on the theory that the statute requiring a biennial assessment was unconstitutional, since it did not afford the taxpayer an opportunity to have a recurring judicial hearing, except in the limited cases stated. The court, after reviewing the revenue act held that under the system of taxation established therein, the taxpayer in order to obtain relief was not limited to the special circumstances enumerated, but that in several sections it clearly appeared that he was afforded an opportunity annually to object to the valuation of his property and an annual hearing was provided. The court therefore dismissed the writ.—*Mooring* v. *State,* 91 So. 869.

License — Taxicabs. — In a Missouri case the owner of a taxicab in St. Louis alleged that an ordinance of said city relating to the licensing of taxicabs was invalid. The court held that the payment of a property tax on a taxicab did not preclude the city from levying and collecting, by a proper ordinance, a license tax on said vehicle, for the privilege of doing business in said city, even though the license tax might operate to some extent as a revenue measure, but a provision in the ordinance that an applicant for a license should pay to the city the sum of $10 as an annual license tax for each taxicab operated in the city, was held not in harmony with the provisions of a state statute providing that license taxes imposed by cities on taxicabs should not exceed half the state registration fixed for motor vehicles which varied according to horsepower ratings from $2 to $24. — *Ex parte Tarling,* 241 S. W. 929.

BOOK REVIEW

MONTGOMERY, R. H., Income Tax Procedure. Edition of 1922. New York: The Ronald Press. 1922.

It is not easy for the layman to appreciate the amount of work involved in the preparation of an adequate manual of our elaborate system of federal income taxation. The magnitude of the task does, however, make one feel the more profoundly grateful to those who have undertaken to point out the rough places, even if they are not able to make all of them plain. The present edition of Montgomery's well-known manual deserves the highest commendation as a thorough exposition of the federal tax law, and of the federal administrative practice as this is developed through treasury decisions and rulings. Chapters are added dealing with the federal estate tax and the capital stock tax. An appendix presents a Supplement to the author's Excess Profits Tax Procedure of 1921.

It is not possible to mention all of the excellent features which make the Income Tax Procedure such an eminently satisfactory manual for the student of taxation as well as for the taxpayer. Concrete illustrative material is provided in abundance. The subject matter is well organized on a logical plan of arrangement. It is especially helpful to have, in connection with each topic, the text of the official regulation or ruling in which is presented the latest view of the administration. Variations in the practice as set forth in earlier regulations are commented upon, and all official promulgations are thoroughly indexed. Numerous footnotes are added, containing the facts concerning the former law and procedure, for the benefit of those who must deal with problems of adjustment arising under the earlier legislation. A brief introductory chapter summarizes the development of state and federal income taxation.

H. L. L.

RECENT PUBLICATIONS

FAIRCHILD, F. R. German War Finance —A Review. American Economic Review, Vol. XII, p. 246, June, 1922. Based mainly upon Les Finances de Guerre de l'Allemagne, by Charles Rist, Professeur á la Faculté de Droit de Paris.

KENTUCKY TAX REFORM ASSOCIATION. Aims of Tax Reform. Bulletin Nos. 60-61; June, July, 1922.

LOUISIANA. Fifth Annual Report of the Louisiana Tax Commission (formerly the Board of State Affairs) for the Year 1921. Baton Rouge, 1922.

LOUISIANA. Budget Recommendations for each fiscal year of the Biennium 1922-24, submitted to the Governor and Legislature by the Louisiana Tax Commission. Baton Rouge, 1922.

MASSACHUSETTS. Annual Report of the Commissioner of Corporations and Taxation for the Year ending November 30, 1921. Boston, 1922.

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PENNSYLVANIA. Report on Productive Industries, Railways, Taxes and Assessments, Waterways and Miscellaneous Statistics, for the Year 1920, by the Department of Internal Affairs. Harrisburg, 1921. Part V contains statistics relative to assessments and taxes.

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The results of the election, so far as concerns taxation proposals, are puzzling and somewhat discouraging. It is puzzling to understand why the people of Utah, for example, should defeat a classification amendment where there was apparently so little opposition that no argument was filed against the measure. It is puzzling to understand just what the electorate of Ohio wants, for a powerful argument against the classification amendment of three years ago was the lack of tax limitations for real property, while the measure recently defeated contained very severe tax rate limitations.

It is discouraging, too, to see so general a reaction against reform taxation measures. It is true that the reforms to be introduced by these proposed constitutional amendments were not all equally meritorious, but there is little evidence, in the results, of any serious effort at discrimination. Oregon defeated the income tax as well as the single tax. Colorado rejected the income tax but approved a good roads proposal, possibly in the belief, or the hope, that the state might win in the game of matching dollars with the federal government. The Ohio amendment would have permitted either classification or the income tax, but neither attraction prevailed. As these returns come in the outlook for progress in tax reform appears rather hopeless.

One ray of comfort may be discerned, however, in the fact that this was an off year, and that taxation proposals which involved change, experiment, and the introduction of new forms of revenue were not only considered less seriously, but were destined to be received less favorably by reason of the fact that two years of business depression does not engender an experimental mood. These same taxation measures would have an entirely different aspect in the cheerful sunlight of prosperity than that which they presented in the cold, gray, cheerless dawn of the morning after panic and depression. We may take hope, then, as we lift our eyes to the dawning of that day, and with the sun of normalcy shining once more, let us "try, try again."

Two very evident lessons in constitutional amendment writing may be derived

from the recent election, at least so far as the situation in Ohio is concerned; and this situation is probably not greatly different from that to be found in various other states. The first lesson is the extreme importance of simplicity in the form of the amendment proposed. The Ohio proposals were not simple, and at more than one point, a double interpretation was possible, despite all the precautions that were taken in drafting them. The average voter has one rule that it is usually safe to follow—when in doubt vote "no". It will be far easier to win public support for an amendment that is short, simple and clear, than for the opposite kind. The amendment proposed some years ago by the National Tax Association is still as acceptable a model as any that we know.

The second lesson is the need of more thorough and more fundamental education in taxation for the public at large. Greater simplicity and clarity of language would make the educative process easier, but would hardly permit it to be dispensed with altogether. The National Tax Association has a responsibility here which should be recognized and discharged more adequately than has been done in the past. Some suggestions along this line were offered by Mr. George Lord of Michigan at the Minneapolis Conference and future conferences should study carefully the ways and means of promoting sound public interest in taxation.

ELECTION RESULTS

The results of the election in those states which were voting on taxation amendments or other constitutional provisions of a financial nature indicate a very general reactionary attitude toward reform propositions.

The only proposals that were carried, so far as we have been able to learn, were the amendment offered in **Montana** for the creation of a State Board of Equalization with the broad powers of the modern tax commission, and the **Minnesota** amendment providing for an additional tax on those concerns engaged in the production of iron ore in the state. The tax is called an "occupation tax", and is to be based on the valuation of the ore. The receipts are to be divided as follows: fifty per cent to the State General Revenue Fund, forty per cent to the Permanent School Fund, and ten per cent to the Permanent University Fund.

In **Michigan** the income tax amendment was very decisively defeated. Four amendments were voted upon in **Colorado,** but the only one to carry was the provision authorizing the issuance of highway bonds for the purpose of taking advantage of federal appropriations. The interest and sinking funds for these bonds are to be paid out of automobile license fees. The amendment providing for the exemption of intangibles from all taxation except an income tax was defeated, as was a proposal for a constitutional convention. The tax commission had supported the latter in order to secure, if possible, constitutional sanction for revision of the revenue laws. The fourth measure contemplated an extension of terms of office of county and state officials to four years.

Oregon defeated all of the tax measures which were summarized in the October issue of the *Bulletin*. In addition, a proposal to authorize the city of Portland to raise $3,000,000 by a special tax on property to pay the expenses of holding an exposition in the year 1925 was rejected.

The people of **Utah** defeated a classification amendment although there had been no argument filed against the amendment with the Secretary of State. A proposition to increase the state debt limit from 1½% to 2% was also defeated. At a special election held in October **Arkansas** rejected a proposal to subject personal property to special improvement taxes, and another which was intended to remove virtually all restrictions on the levy which school districts might make in support of public education. **Arizona** took similar action in September on a proposal to increase the debt limit of the state. The proposed amendment to the constitution of **Illinois** will be voted upon at a special election to be held December 12th.

TAX INVESTIGATION PROPOSED FOR WINNIPEG

The Winnipeg Taxpayers' Association has asked the Municipal Council for a special investigation into the present system of taxation. The petition which was presented made the statement that 90 per cent of the city's revenue was derived from

the taxation of real estate and that arrears of taxes had been greatly increased within the last twelve years with many forfeitures of property.

The members who attended the Minneapolis Conference will recall that the papers which discussed the Canadian tax situation emphasized this fact. The special points which were suggested for the consideration of the investigating committee included the following:

" 1. The present system of taxation, with special reference to the incidence and equitable distribution of the tax burden and the inequalities thereof.

" 2. The obligation of the utilities to pay their way and, in addition, to contribute something to alleviate the condition of general taxation.

" 3. The system of tax sales as proper means of forcing taxpayers to pay taxes.

" 4. The application of sinking fund surpluses to relieve the general tax burden.

" 5. A system of taxation whereby the particular benefit received by any class of citizens shall be paid by such class of citizens.

" 6. The question of reduction and control of school expenditure so that the amount paid for education shall have a closer relationship to the ability of the taxpayer to pay it.

" 7. Some equitable method of dealing with present tax delinquents and the accumulated arrears of taxes.

" 8. Generally, to inquire into, and devise, if possible, a more economical system of government."

TAX ON CORPORATE SURPLUS

The following comments on the taxation of corporate surplus under the Federal Revenue act by Godfrey N. Nelson, are reprinted from the *New York Times* of November 15th:

" Within the period of a few recent weeks some of the leading corporations, in less than a dozen industries, have declared stock dividends aggregating in amount nearly a billion dollars. Were these declarations prompted wholly by a feeling of apprehension on the part of the corporations' directors over the taxable status of the surplus out of which they were declared? I think they were not.

The practise of distributing dividends by the issuance of additional capital stock is not new, but the recent frequency and volume of such distributions seem to have given rise to the impression that they are being made for reasons that are new.

Expansion of the business of a corporation necessarily involves an increase of its working capital. The increased working capital is, generally, represented in part by current assets and in part by fixed assets, the proportions varying according to the nature of the business. If the increased working capital was derived from accumulated earnings, that part thereof which has gone into fixed assets, such as buildings and machinery, is no longer available for the payment of dividends. A stock dividend declared out of accumulated earnings so employed, or necessary for the financing of the increased business, needs no excuse for its issuance. It is justifiable because it strengthens the financial position of the corporation.

In my opinion, the tax considerations for the declaration of stock dividends are secondary. But the advantages of declariny stock dividends at this time are real and potent ones. A stock dividend having been held not to constitute taxable income to the recipient, it would seem to follow that, despite the stock dividend, no income has been distributed. On the other hand, if the surplus has in fact been converted into capital stock the earnings no longer exist as surplus. Any new tax on surplus must, it seems to me, be laid on the accumulated earnings as surplus of the corporation. A tax upon the accumulated income, as income, would be an additional income tax, again taxing income already subjected to taxes in prior periods; and a tax thereon, less the distributed income, would still be a retroactive income tax. I realize that all things are possible in the way of tax legislation, but I believe that out of respect for business progress, on which our national well-being is largely dependent, we are through, at least for the present (in the absence of some serious exigency), with retroactive tax legislation.

Generally defined, the surplus of a corporation is the excess of assets over the liabilities and the capital stock outstanding. It would follow, therefore, that a tax upon the surplus would affect only the

balance of surplus after the stock dividend is deducted therefrom.

The Revenue Act of 1918 contains a provision by which an unreasonably large accumulated surplus could be taxed. A somewhat similar provision, but considerably broader in its scope and effect, is contained in the 1921 Revenue Act, now effective. I know of no instance wherein either of these provisions has been enforced, or where even an attempt has been made to enforce them.

I do not believe there will be any attempt at an enforcement of these provisions except in the most palpable cases of evasion, as, for example, where a corporation has been organized for the specific purpose of accumulating income. According to the language of the provision there can be no enforcement unless the Commissioner of Internal Revenue certifies that in his opinion the accumulation is unreasonable for the purposes of the business.

In cases sufficiently flagrant to come within the evasion section of the law it is unlikely that a stock distribution of the surplus will be availing to the corporation. The only thing that could save such corporations is a technical construction in their favor by the courts of language containing this provision of the law.

It is entirely possible that a tax will be laid on stock dividends, as an excise tax, for the privilege of issuing stock dividends. As an excise tax, however, there is little, if any, likelihood of its being retroactive."

NEW SOURCES OF REVENUE IN NEW YORK STATE

The New York Tax Commission reports that the new laws providing for the licensing of real estate brokers and operators and of billiard rooms, have produced to date some $230,000 without any additional administrative cost. These laws were enacted without appropriation for administration and with no provision for any part of the collections to be used for administrative expenses. The Tax Commission was asked to take charge of them and do the best it could, with the result above indicated.

One-half of the collections were turned back to the communities for the reduction of local taxation.

RESULTS OF THE WISCONSIN INCOME TAX IN 1921

Mr. Thomas E. Lyons of the Wisconsin Tax Commission sends the following summary of the results of income taxation in Wisconsin for the year 1921:

The assessment of the income of corporations for the current year based on their income for 1921 shows a great falling off in income taxes. The normal income tax assessed against corporations for the current year on their 1921 income will scarcely reach $3,600,000 as against an assessment of $7,574,050 from the same source last year, according to a statement issued by the tax commission today. This estimate includes the additional taxes for former years resulting from field audit, amounting to nearly $1,000,000, yet the total is less than fifty per cent of the tax assessed on corporate income for the preceding year.

There is even a greater slump in the surtax for soldiers' educational bonus. The assessment of corporations for that purpose in 1921 was $954,320.86 and the tax commission estimates that the assessment against corporations for that purpose will not yield to exceed $350,000 for the current year. The teachers' retirement fund surtax will also be reduced in about the same ratio.

These figures do not include the tax on the income of individuals and partnerships because it is not yet reported to the tax commission by assessors of incomes. Reports thus far received indicate that the shrinkage will not be as great on individual incomes as in the case of corporations; but it is not expected that the yield from that source will far exceed $3,000,000 as against a tax of $5,084,256 last year.

It appears from the above figures that the tax on the regular income of corporations for 1921, exclusive of the additional taxes for former years resulting from field audit, had dropped close to the pre-war level.

TENTH NEW ENGLAND TAX CONFERENCE

Under the auspices of the New England State Tax Officials' Association the tenth New England conference on taxation was held at the State House, Boston, Massachusetts, November 16th and 17th.

Besides tax administrators of the various New England states, the conference was attended by Professor Charles J. Bullock of Harvard University, Professor Fred R. Fairchild of Yale, Mr. H. C. McKenzie, director of research in taxation of the American Farm Bureau Federation, and the secretary of the National Tax Association.

Recent and proposed changes in the tax laws of New England were reviewed and discussed, including the results of recent investigations in Vermont and Connecticut to determine the relation between taxed values and commercial values of real estate. The practice of granting exemption from taxation to new manufacturing property for a period of ten years, which has been prevalent in New England and is still followed in four of these states, came in for quite general denunciation, and a resolution favoring the repeal of laws which permit this policy was adopted. A concerted effort to bring about such repeal was favored and from present indications will be undertaken at forthcoming legislative sessions.

Professor Bullock favored the conference with a learned discussion on the relation of the state income tax to property taxes. This opened up the general subject of the results of efforts to reach intangibles through the income tax, the classified rate, and by other means, in the discussion of which a diversity of opinion as between the classified rate and the income tax was apparent. Professor Fairchild, in maintaining that the theory underlying the taxation both of intangibles and of the physical property represented by intangibles was fallacious, was opposed by the tax administrators who strongly contended that the taxation of intangibles under the classification system was fully justified by considerations of practical expediency, if not theoretically.

Mr. Fred T. Field, former assistant attorney general of Massachusetts, who was unable to present his paper on the valuation of capital stock for assessment purposes at the National Tax Conference in Minneapolis last September, contributed a very interesting and profitable number on this subject, reciting the results of his investigations and the conclusions he had reached.

Reports of the National Tax Association committees on the taxation of public utilities, forestry taxation, inheritance taxation, and on the apportionment of taxes of interstate mercantile and manufacturing business, were discussed by members of the respective committees who were in attendance. The effect of the Richmond decision on bank taxation in the New England states was considered at some length and inspired able arguments by Mr. McKenzie of the American Farm Bureau Federation and William H. Hitchcock, special counsel for the City of Boston in the First National Bank case.

Officers for the ensuing year were elected as follows: President, William H. Blodgett, Tax Commissioner of Connecticut; Vice President, Joseph S. Matthews, Assistant Attorney General of New Hampshire; Secretary, Edward P. Tobie, Chief Clerk of the Board of Tax Commissioners, Rhode Island.

EDWARD P. TOBIE.

NEW-FANGLED TAX LAWS IN CONNECTICUT

Extracts from an address by WILLIAM H. BLODGETT, Tax Commissioner of Connecticut, before the New England Tax Conference held at Boston, Massachusetts, November 16-17, 1922.

THE UNINCORPORATED BUSINESS TAX

The Act, Chapter 393, public acts 1921, levying a tax with respect to the carrying on of mercantile business by others than corporations, or as it is more commonly called, the unincorporated business tax act, passed by the general assembly of 1921, was retroactive to January 1, 1921. It was deemed justifiable on the ground that corporations in this state have been required to pay taxes to the state since 1915, whereas individuals or partnerships conducting large and prosperous businesses in like or similar lines have not done so. An additional argument in favor of its passage was that it would yield needed revenue and at the same time obviate the necessity of further taxation of real estate through an increased state tax on towns.

The rate of the tax is one dollar per

thousand of gross receipts derived from manufacturing and retail business and twenty-five cents per thousand derived from wholesale business, but the act provides for a minimum tax of $5.00 in every case. The rates were fixed sufficiently low to prevent interference with the flow of trade and the imposition of any appreciable increased costs to consumers.

A provision in the act enables a taxpayer (in compliance with departmental rulings) upon submitting adequate proof of loss in the conduct of business during the tax period, to be relieved from paying the tax on the basis of income and renders him liable to the minimum tax only. During the year 1921, especially in the early part of it, business conditions were generally depressed and many taxpayers, some of them doing a large volume of business, claimed losses which, upon investigation were allowed, with the result that such taxpayers were assessed only the minimum five-dollar tax. Except for this provision such taxpayers would have been assessed at the regular rates upon their gross business regardless of the profit or loss feature. In order to determine claims of loss it was necessary to employ a field force of investigators at considerable expense to the state. Obviously, this provision affects the revenue feature of the law adversely in that it reduces tax receipts and very materially increases the cost of administration, by reason of the investigation of such claims. As stated above, the rate of tax is so low, being only one-tenth of one per cent on manufacturing and retail business and one-fortieth of one per cent on wholesale business, that it should be applicable to amounts of gross income, regardless of losses claimed, and it is to be hoped that the general assembly of 1923 will amend the act to that end.

Although the responsibility for making returns to the state rests upon the taxpayers, it was considered necessary, in setting up the administration of the act, to make a census of those coming under its provisions. This was done in October, 1921, by a temporary force of thirty-five enumerators, at a cost of approximately $5,000. By this method, necessary information relative to 29,428 taxpayers was secured. In January, 1922, return forms were mailed to these taxpayers, that the forms might be properly made up for the calendar year 1921 or any part of the year during which business was conducted.

As was anticipated in the application of a new act, affecting business of varied character and size, not more than about 60% of returns were filed with the state on or before the due date—March 15th—but continued application to taxpayers, by various follow-up methods, resulted in securing up to November 1, 1922, 24,892 returns. The difference between the number of taxpayers enumerated and those making returns is accounted for by duplications, consolidations, inability to locate certain persons who were in business but a few weeks or months and who moved to parts unknown, and for similar justifiable cases.

To November 1st, the assessments made upon returns secured totaled $419,839.70, all of which were passed on to the state treasurer for collection. The largest single assessment was $3,600, and there were 10,456 assessments of $5.00 each. The distribution of assessments in the several counties of the state is shown in the following table:

County.	*Number of Taxpayers.*	*Assessments.*	*Average Assessment per Taxpayer.*
Hartford	5,967	$102,611.39	$17.20
New Haven	8,233	131,365.96	15.96
New London	1,803	33,890.13	18.80
Fairfield	5,297	92,638.63	17.49
Windham.	915	14,876.80	16.25
Litchfield.	1,443	22,737.25	15.76
Middlesex	840	13,423.29	15.08
Tolland	349	8,296.25	21.06
Totals	24,892	$419,839 70	$16.87*

*General Average.

THE TAX ON ADMISSIONS

An act imposing a state tax on tickets of admission to places of amusement, passed by the general assembly of 1921, is based on the federal act imposing a similar tax, not differing from it in any essential except that the state tax rate is one-half the federal rate.

These taxes are payable directly to the tax commissioner within two days after the federal taxes have been paid. All moneys received are transferred daily by the tax commissioner to the state treasurer. One-half of the amount collected is paid by the treasurer, in quarterly installments, to the treasurers of the several counties of the state, the payments being apportioned to population (1920 federal census) in the ratio which the population of each county bears to the total population of the state. The other half of the moneys collected is retained by the state.

This act is administered at small expense to the state, as two part-time employees and two full-time employees transact the entire business on the part of the state. Additional assistance is rendered as occasion requires by the several county commissioners, who are statutory agents of the tax commissioner for the enforcement of the provisions of the act.

This act became effective September 1st, 1921, and there are now 429 so-called "regular" taxpayers of record, most of whom remit each month, together with a large but of course variable number of casual or occasional taxpayers.

During the twelve months ended Aug. 31, 1922, the actual receipts from this source amounted to $450,484.09; additional payments received between September 1st and October 20th, upon operations conducted during the above mentioned twelve-month period amounted to $38,897.90, making a total of $489,381.99 for the first year of actual operation. Of this amount $52,070.29 from operations in October, 1921 was the largest amount received for any one month, $28,257.09 for July, 1922 was the lowest, and the monthly average for the year was $40,781.84.

The counties of the state were severally benefitted by receipts from the admission tax revenue in the following amounts received from the state treasury in four quarterly payments, being disbursements for the year ended September 30, 1922:

Hartford	$58,672.61
New Haven	72,499.00
New London	18,265.66
Fairfield	56,037.50
Windham	9,221.77
Litchfield	13,315.83
Middlesex	8,302.59
Tolland	4,752.17
	$241,067.13

It will at once be seen that these payments to the counties, available for county expenses, are most equitable and desirable.

As in the case of the unincorporated business tax act, this law again demonstrates the feasibility of securing additional revenue from other sources rather than imposing further taxation on real estate.

THE TAXATION OF CAPITAL GAINS

GEORGE O. MAY

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The treatment of capital gains under a steeply graduated income tax law constitutes one of the most difficult problems in fiscal legislation as is sufficiently evidenced by the changes contained in successive revenue acts. Impartial students of the subject will, it is believed, agree that the present state of the law is not satisfactory, and among the remedies which are receiving consideration is the abandonment of the taxation of capital gains and of the allowance of capital losses as a deduction from taxable income. In Great Britain, where capital gains have not heretofore been taxed or capital losses allowed as deductions, the question is being debated whether some change in the law is not necessary on account of the avoidance of taxation of what is essentially income by clothing it in the garb of capital. The time, therefore, seems opportune for a discussion of the problem.

I. The Nature of Capital Gains

By capital gain is meant the profit upon the realization of assets otherwise than in the ordinary course of business; this profit being the excess of the proceeds of realization over the cost of the property realized.

In considering the proper treatment of capital gains under an income tax law it is desirable to keep in mind three different causes which may make a capital gain possible. These are:

(1) Change in absolute value due to natural growth or similar causes.
(2) Change in relative value of property in comparison with other property, due to external causes.
(3) Change in the money value of property due to depreciation or appreciation of currency.

In most cases, of course, a capital gain is due to a combination of these influences, some perhaps operating in a favorable, others in an unfavorable direction. All three, for instance, operating favorably might be found in the sale in the spring of 1919 of a privately owned barrel of whiskey bought as new whiskey in 1913. There would be first the increase in absolute value due to aging, second the increase in relative value due to the legislation enacted in January, 1919, and third the increase in money value, common to nearly all property, resulting from the expansion of currency and credit during the war.

Looking at the problem from the standpoint of principle, the gain due to the first cause is clearly only a special form of investment income, and therefore naturally comes within the purview of an income tax. Gains due to the second cause are real gains, and therefore fairly taxable, even if not ordinary income. Indeed if discrimination in favor of earned income as against investment income is well founded, it may well be argued that these gains from unearned increment should be regarded as less entitled to consideration than ordinary recurring investment income.

Gains from the third cause are more apparent than real. There would seem to be no true income or gain from selling property at double its cost, if everything which can be bought with the proceeds is also selling at double its former price. This has been a common situation in recent years and has been complicated by the factor of involuntary sale or realization. In recent tax laws attempts have been made to meet it, first by replacement fund provisions under which no taxable profit is deemed to be derived from an involuntary sale if the proceeds are put aside to be employed in replacing the property, and secondly by the provisions in the 1921 law, permitting exchanges of property without any liability to taxes as a result thereof.

II. Relation of Capital Losses to Taxation of Capital Gains

As a practical proposition it would be impossible to analyze every capital gain into its component elements and apply different rules to different elements. In particular it would be a hopeless task to convince the average taxpayer who had completed a transaction showing a loss, that he should pay a tax on the transaction because the loss was found upon analysis to be made up of an increase of value due to the first or second of the three causes above mentioned and therefore taxable, offset by a larger loss arising from the third cause and therefore outside the scope of the tax law.

The alternatives, therefore, are to tax all gains or to exclude all gains, except such as can be covered by simple rules. In considering the question whether capital gains should be taxed, the successive points which arise are:

(1) Is it in principle desirable to tax capital gains?
(2) If so, should capital losses be allowed as a deduction from taxable income?
(3) If both the first and second questions are answered in the affirmative, how serious are the dangers of evasion and how far is it practicable to guard against them?

It must be understood that the danger of avoidance is not disposed of by excluding capital gains and losses from the scope of the income tax, as is evidenced by the movement in England already referred to. A majority of economists would probably take the view that capital gains are not a proper subject for taxation under the guise of an income tax. Apart from this technical point, however, it would seem that in principle capital gains would form a most appropriate subject of taxation and

the Supreme Court has held that they can be taxed as income. Some theoretical considerations have already been briefly recited. Among other reasons which would have weight with a statesman as well as with a politician is the fact that the great accumulations of wealth by individuals in the country have largely been the result of capital gains, and the salary- or wage-earning classes might quite naturally feel that they were being unjustly discriminated against if they were taxed on their salaries or wages, and the large capital gains of the very wealthy should escape taxation. Moreover, even if the taxation of capital gains be regarded as necessarily involving the allowance of capital losses, it would seem that treating both on the footing of income would ordinarily be expedient in a developing country in which naturally the capital gains would far exceed the capital losses. This proposition is, however, subject to the important qualification that it holds only so long as the form and degree of taxation are not such as to discourage the realization of gains and encourage the taking of losses, and thus to cause a serious disturbance of the normal balance between gains and losses.

Turning to the second point, while it may seem that in justice the rules regarding gains and losses in a tax law should be as nearly as possible similar, it may be recalled that this principle has not usually been applied in our income tax laws. Even in the case of ordinary business until the enactment of the present law a taxpayer who made a profit on trading in one year and an exactly similar loss in another paid tax on the profit and obtained no relief in respect of the loss. As regards losses not incurred in the taxpayer's trade or business the Act of 1913 allowed no deduction and the Act of 1916 allowed a deduction only to the amount of the gains of a similar character included in the same return. The tax rates under these acts were, however, small as we now reckon tax rates and the problem becomes difficult only when taxes are large. In 1917 when the maximum rate of tax was increased from 15% to 67%, the limitation on the deduction of losses contained in the Act of 1916 was continued, but in 1918 when the maximum tax was still further increased to 77% all limitations on deductions of capital losses were removed.

Even under this law if a taxpayer pursued the even tenor of his way undisturbed, taking capital gains or capital losses as his judgment of present and prospective values dictated, and entirely uninfluenced by tax considerations, he was not in the position that tax relief resulting from a loss was exactly equivalent to the tax burden resulting from an equal gain. Such a taxpayer, if he incurred losses, was thereby relieved from surtax at the rates he would have paid on his regular income; if, on the other hand, he made a profit, he paid surtaxes at the higher rates applying to income in excess of his regular income.

Thus to take the case of a man who had a regular income in each of the years 1919 and 1920 of $50,000 and sold one investment at a capital loss of $20,000 on December 31, 1919, and another at a capital gain of $20,000 on January 1, 1920; in 1919 he paid on an income of $30,000 a total tax of $3,890, in 1920 on an income of $70,000 a total tax of $16,490, together $20,380. If, however, both transactions had fallen in the same year he would have paid on an income of $50,000 in each year a tax of $9,190; a total for the two years of $18,380, and his capital gain, therefore, cost him in taxation $2,000 more than he saved on his capital loss, though the tax rates were the same in both years.

However, this discrimination against the taxpayer was of relatively minor consequence compared with the wholesale loss to the Government resulting from the fact that taxpayers liable to heavy rates of surtax very generally refrained from taking profits, but not from taking losses. It is impossible now to estimate the loss of taxes which have resulted from this disturbance of the normal policy of investors, but it must have been enormous. At the same time transfers which were desirable from the broad standpoint of public welfare were retarded or prevented. Men of advanced years, who were anxious to turn over their business affairs to younger and more vigorous men, were deterred from doing so by the tax which would have fallen upon them in the event of a sale, and in innumerable ways the ordinary course of business was affected by the artificial restraint on sales at a profit and the encouragement of sales at a loss.

To meet some phases of the problem, extensive new provisions were introduced in

the Act of 1921, mainly in two forms, (1st) the limitation of the tax on capital gains in the case of investments carried more than two years at 12½%, and (2nd) provisions under which capital assets could be exchanged rather than sold without any tax being incurred. Under this law the rule that what is sauce for the goose is sauce for the gander invoked by taxpayers in support of the removal of the limitation on deductible losses in 1918 was waived in favor of the taxpayer. Logically the converse of the first provision just referred to would have been that a taxpayer sustaining a capital loss should pay the ordinary tax on his regular income and deduct therefrom 12½% of the amount of his capital loss. The Act, however, permits him to save the maximum surtax he would otherwise have paid. Thus, to use the same illustration as before, under the existing law a taxpayer with a regular income of $50,000, a capital gain of $20,000 in one year, and a capital loss of $20,000 in the next, pays over the two years $2,800 less than if both transactions had occurred in the same year.

In the case of the very wealthy, therefore, the present law makes it distinctly advantageous to take capital gains one year and pay a maximum tax of 12% thereon and take capital losses in another year, saving the maximum surtax to which the taxpayer would otherwise have been liable.

The position in regard to the exchanges is even more unfavorable to the Government. A taxpayer holding stock of the A.B. Company desires to dispose of it and reinvest in the stock of the C.D. Company. If the present market value of the stock of the A.B. Company is less than its cost to him, he sells this stock and buys the stock of the C.D. Company and is entitled to a deduction from his taxable income of the loss on sale. If, however, the market value of the stock of the A.B. Company is above cost he arranges an exchange of this stock for stock of the C.D. Company with a cash adjustment, and under the law he derives no taxable gain and therefore pays no additional tax.

From this brief summary it will be seen that in less than ten years the relation between the provisions regarding capital gains and those regarding capital losses has been changed from one of marked disparity in favor of the revenue to an even greater disparity in favor of the taxpayer. Probably every change has operated to the detriment of the revenue except to the extent that legislation has been retroactive and heavy taxes have been levied on transactions which would never have been consummated if a change in the law had been anticipated. Retroactive legislation, however, is not a desirable practice, and while it was doubtless justified in a time of world warfare, it should be banned for the future like many other practices developed during the war.

The above history of legislation since income taxes became possible on March 1, 1913, suggests that though the disparity in favor of the taxpayers may be lessened, it would not be practicable even if desirable to restore the old disparity in favor of the Government. It will be assumed, therefore, that if capital gains are to be taxed, capital losses must be allowed as deductions on at least an equal basis. Though specific provisions may facilitate tax avoidance or make it more difficult, the Treasury in dealing with all such problems suffers from the fundamental disadvantage that it is the taxpayer who not only decides the time and the form of transactions giving rise to capital gains or losses, but exercises the option whether they shall take place or not. To use a military analogy, the initiative, whose value in warfare is universally recognized, is always with the taxpayer. The Treasury has its fixed defences; the taxpayer moves only after careful study of these defences, and it is not surprising that the Treasury, with a defence impregnable against a frontal attack, often finds itself helpless against an enveloping movement which attacks it in the flank or rear. This disadvantage is increased by the fact that the distinction between ordinary income and capital gain is often a fine one, and a slight change in the form of the transaction may throw it into one class or the other. If, therefore, the Government decided to tax capital gains and allow capital losses as deductions, the taxpayer can refrain from taking gains but may take losses. If, on the other hand, the Government should exclude capital gains and capital losses from the scope of the income tax altogether, there is danger of transactions which essentially give rise to income being cast into such a form that the gain would technically be held to be a

capital gain. How fine the distinctions are, and incidentally how unexpected may be the results to the Government and to the taxpayer of any action outside the ordinary course of business in a time when tax laws are rapidly changing both in form and in degree of severity, is very well illustrated in the case of the Phellis or du Pont case. This case and the Rockefeller Prairie Oil and Gas case decided by the Supreme Court at the same time, constitute two of the most complete, and in amounts involved the most considerable, of the Pyrrhic victories of the Treasury in tax litigation. The point at issue was not, of course, whether the transaction involved resulted in a capital profit or in a profit in the nature of ordinary income, but what might seem a much simpler question, whether it resulted in any profit at all.

III. The Phellis Case

The amounts involved in the Phellis case are so large and its features so striking as to make it worthy of detailed consideration.

The facts are briefly that the E. I. du Pont de Nemours Powder Company of New Jersey in 1915 transferred all its assets to a Delaware company in consideration of debentures and stock of that company, and retaining debentures of the Delaware company equal to the par of its common stock (approximately \$30,000,000) distributed to its common stockholders two shares of Delaware company stock for each share of New Jersey company (or an aggregate of \$60,000,000). The market value of the Delaware company's stock at the date of distribution was \$347.50 per share. The Supreme Court has now found that this distribution was a dividend taxable to the stockholders of the New Jersey company, and by this decision has added to the taxable income of 1915 an amount of approximately \$210,000,000, or nearly 5% of the total taxable income disclosed by all the individual tax returns of that year.

The five judges of the Court of Claims agreed in the view that in substance there was no income to the stockholders of the New Jersey company because the stock of the Delaware company represented the same property and business as the stock of the New Jersey company had previously represented. This view was supported, however, by only a minority of the Supreme Court, the majority finding that both in substance and form the stock of the Delaware company constituted real income to the stockholders of the New Jersey company.

In passing, it may be remarked that while each of the courts looked beyond the form and discussed the substance of the transaction—one finding that in substance there was no dividend, and the other that the whole of the stock of the new company at its market value constituted a dividend—in neither court was a third alternative discussed which seems most accurately to reflect the substance of the transaction. This alternative is that the stock of the new company represented substantially what the old stock had previously represented, and that the old stock, which after the transaction represented only an equal amount of debentures of the new company, was the real dividend. In substance the position of the stockholder after the transaction was almost identically the position in which he would have been placed had the New Jersey company created \$30,000,000 of debentures and issued them to the common stockholders by way of dividend, or even if it had sold \$30,000,000 of debentures at par and paid the cash to its stockholders. After the transaction the stock of the old company represented to the stockholder of the old or New Jersey company, something severed from the du Pont property and business which he could realize without reducing in any degree his proportionate interest in the general du Pont assets.

The controversy extended over six years, during which time anyone who was a stockholder at the time of the reorganization and who subsequently sold a part of the whole of his stock in the Delaware company was unable to determine whether under the income tax law he had made a profit or loss by doing so. If, for instance, such a stockholder sold ten shares of the Delaware company's stock for \$2,000, the transaction would on the Government's theory result in a deductible loss of \$1,475. If, however, the Government's contentions were overthrown, the result would be a taxable profit of a rather greater sum. The Government having won, it is interesting to consider what this victory has gained for it and what has been, or will be, the cost.

The keynote of the decision by which the Supreme Court held that stock divi-

dends were not taxable was perhaps the statement that a stock dividend provided nothing out of which the stockholder could pay a tax without parting with some portion of his interest in the corporation. Assuming that the taxpayers who were called upon in 1921 to pay surtaxes on the profits which they are deemed to have made in the transaction of 1915, should have had recourse to the sale of their stock to provide funds with which to pay their tax, what will their position be?

The market value of the stock of the Delaware company was at the time of the decision roughly par. Any holder who received his stock as a dividend in 1915 pays tax in that year on the basis of a value of $347.50 per share, and if he sold in 1921 he is entitled to claim a loss on sale in 1921 of $247.50 per share. In 1915 the normal tax was 1% and surtaxes beginning at incomes of $20,000 ranged from 1% to 6%; in 1921 the normal tax was 8% and surtaxes beginning at incomes of $5,000 ranged from 1% to 65%. It will be apparent at once, therefore, how great the advantages of the decision to a taxpayer may be. Taking by way of illustration the case of a married man without dependents whose income apart from the dividend in 1915 or sale of stock in 1921 was $7,500 in each year, and assuming that he held 10 shares of the New Jersey company's stock and received 20 shares of the Delaware company's stock as dividend in 1915, and that he sold this stock in 1921 at $100 a share, it will be found that the dividend does not bring him into the surtax class for 1915, so that he has no additional tax to pay for that year, but the loss of sale in 1921 reduces his taxes for that year from $320 to $2.

Multiplying the figures twenty-fold and taking a man whose income was $150,000 in each year and whose original holdings of the New Jersey company's stock was 200 shares, it will be found that the addition of the dividend to his income for 1915 increases his taxes for that year by $5,950, and the loss on sale in 1921 decreases his taxes for that year by $51,650.

The full effects of the decision are not reflected even in these figures, as had the opposite decision been reached there would have been a taxable profit instead of a loss on any sale of stock in the Delaware company. Presumably the decision will also involve considerable saving of tax to the Delaware company.

No doubt some stockholders had sold a part or all of their stock prior to 1921 and in other cases the stock is held by persons who would not, and perhaps could not without difficulty, sell any great proportion of their holdings. The cost of the victory to the Government will therefore probably not come near its potential limits.

It is, however, reasonably certain that the cost to the Government in the form of taxes lost will enormously exceed the additional taxes recovered as a result of the decision, and one is tempted to ask questions like those of the children in Southey's poem "After Blenheim", and one finds no answer except Kaspar's:

> " But what they fought each other for
> I could not well make out.
> But everybody said," quoth he,
> " That 'twas a famous victory."

A similar analysis of the Rockefeller and Harkness cases would lead to a similar conclusion.

The claim of the Government was at best largely technical since it could not be said that the du Pont stockholders realized true income from the transaction in an amount approaching the two hundred millions which the court held must in law be deemed to be derived therefrom. The case turned on the special facts of a very unusual transaction and established no new principle, and the net result in the particular case of the Government's contentions being upheld was bound to be a loss of revenue. It is surprising, therefore, that the Government did not accept the verdict of the Court of Claims.

The position after this decision and the stock dividend decision (*Macomber* v. *Eisner*) would have been most unsatisfactory if Congress had not in the 1921 law provided in substance that no income should be deemed to be derived from corporate reorganizations.

The interest of the case in relation to the subject of this discussion lies in the evidence it affords of the room for wide difference of opinion concerning the income-producing effect of a transaction, even if the question is considered with regard to its substance and not merely to its form.

The room for difference of opinion on the question whether some of the complicated transactions of modern corporate

finance produce income in the narrower sense, capital gains, or no gain or income at all, is obviously even greater.

IV. Conclusions

A study of the subject over a period of many years has led the writer to the conclusion that while either course is fraught with danger and tax avoidance on a large scale is bound to continue as long as high rates of surtaxes are maintained, on the whole the losses of revenue involved in the taxation of capital gains and the allowance of capital losses as deductions from taxable income are greater than those involved in the opposite course; further, that the margin is so great as to outweigh the consideration that in principle it is preferable to tax capital gains. Neither the war period, with its extravagant gains and unmerited losses, or the period of readjustment immediately after the war was an opportune time for a change of policy in this regard. As, however, we get back to more normal conditions, such a change seems worthy of the most serious consideratoins, more especially as the existing law in remedying defects of the old law has created new opportunities for tax avoidance from which the Government is bound to suffer very heavily.

If capital gains and losses are in general to be excluded from the scope of the income tax, safeguards will be necessary to prevent a wholesale escape from taxation of income by conversion into capital form. It is believed, however, that three provisions would be sufficient to prevent the great bulk of such evasion, namely:

(1) That where a capital gain or a capital loss arises in respect of an asset, which from its nature is subject to a natural increment or decrement in value, any gain shall be deemed to be income to the extent of a reasonable return on the investment for the period during which it has been held. Conversely the natural decrement should be allowed as a deduction from taxable income.

(2) That where property is disposed of within, say, two years of its acquisition, the transaction shall be deemed to be a trading transaction and not a capital investment.

(3) A provision under which the tax would be levied on the sale of stock corporations, particularly private corporations, where it might appear that there was a profit which was attributable to the accumulation of undivided profits by corporation and that the sale was made to avoid the imposition of the tax which would be assessed on such profits if distributed as dividends.

Of the three provisions it is believed that only the third would offer serious difficulty in its formulation and it should readily be possible to surmount these difficulties with the assistance of a group of persons familiar with business practice and with tax procedure.

Doubtless the adoption of this suggestion would involve the definite abandonment of a large amount of revenue which the Government ought some day to receive, but it is not believed that the sacrifice of revenue which the Government would otherwise be likely to receive would approach in amount the increase in revenue that would result from the elimination of deductions for losses.

Tax avoidance on a substantial scale would doubtless continue even if the suggestion were adopted, but this is bound to be true under any law so long as the extreme surtaxes now in force are continued. Most students of the subject are in agreement with the views expressed by the Secretary of the Treasury in his letter to the chairman of the House Committee on Ways and Means of April, 1921, that the immediate loss of revenue that would result from the repeal of the higher surtax brackets would be relatively small and the ultimate effect should be an increase in the revenue. Congress apparently clung to the outworn idea that such a repeal would result in a loss to the Treasury for the sole benefit of the rich. It will, however, ultimately be forced to recognize the shortsightedness of its policy, especially having regard to the existence of the huge volume of tax-exempt securities.

In justice to the present Congress one must recognize that not only is the problem an extremely difficult one, but it is made more difficult by the sacrifice of sound principles to political expediency in the original adjustment of income taxation to war necessities. Given a business world organized largely in the form of private companies which are practically incorporated partnerships, a world in which business transactions may readily be cast into

different forms so as to produce ordinary income or capital gains as may be the more advantageous and given also a huge volume of tax-free securities; under such conditions the combination of a low normal tax on income of individuals and corporations with very high surtaxes is neither equitable nor effective. This is equally true whether capital gains and losses are treated as entering into the determination of income or not. The form of tax avoidance changes to meet either rule. The only real solution is to reduce the disparity between normal taxes and surtaxes.

Had the Congress recognized these facts in war time and raised the normal tax and the lower range of surtaxes to higher levels as urged by the Treasury, it would have been possible later to make reductions all along the line. It is not surprising, however, that the present Congress should look askance at a proposal to increase the normal tax and the lower surtaxes and reduce the higher surtaxes. Though in reality such a scheme would be sound finance and benefit the entire community, it seems on the surface too much like a scheme to relieve the rich at the expense of the relatively poor to be expedient from the standpoint of party politics. It is certain, however, that the high surtaxes will prove increasingly ineffective and injurious the longer the present system is continued.

In the meantime, it is believed that the revenues can be increased, tax avoidance greatly diminished, and greater equity secured by the abandonment of the rule of taxing of capital gains and, conversely, of allowing capital losses as a deduction from taxable income.

TAXATION

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There has been no more prophetic utterance than that expressed in the opinion of Chief Justice John Marshall in the case of *McCulloch* v. *Maryland* (4 Wheaton 316, U. S. Supreme Court, February 1819 term) where the law of Maryland imposing a tax on the operations of a national agency was held to be unconstitutional: " That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create."

The present tax laws and their administration are one of the chief discontents of the American people, and there are two fundamental reasons, broadly speaking, why this is so. The primary cause is the intricacy and complexity of the laws themselves which are often not understood by the legislators who enact them and therefore place the bewildered public in an uncertain state of mind as to how to compute their taxes and how much reserve to pay them at a future date after the year's transactions are done.

The second fundamental cause of discontent is dependent upon the first, and lies in the administration of the laws. It is absolutely impossible to get enough satisfactorily trained administrators, investigators, accountants and examiners to properly adjust, examine and settle finally, with justice to the public, all claims and assessments because of the constantly changing rulings, regulations, opinions and court decisions, all of which are continually reversing, modifying or reclassifying previous interpretations of the law and methods of its application.

Where local or state taxes on real or personal property are assessed, there is not the difficulty which arises in connection with income taxes and franchise taxes which are dependent on the amount of income or the amount of capital employed in business as the bases of their computation.

The chief difficulties for the taxpayer are nearly as often a problem for the administrative authorities and governmental collecting agencies. Under present conditions and the extreme necessity for revenue the taxpayer in doubtful cases is sometimes not given the benefit of a reasonable doubt.

For concrete illustrations a few of the more unreasonable applications of the federal income tax law which is so closely followed in its wording and application by

some of the state income tax laws, are hereinafter dissected:

Section 226 (c) of the Revenue Act of 1921 has been interpreted by the treasury department to apply to estates of decedents for a part of a year, and reads as follows:

> "(c) In the case of a return for a period of less than one year the net income shall be placed on an annual basis by multiplying the amount thereof by twelve and dividing by the number of months included in such period; and the tax shall be such part of a tax computed on such annual basis as the number of months in such period is of twelve months."

The effect of this provision as interpreted by the treasury department in Regulations 62, article 431, is to tax the estate of a decedent, and, technically, the personal representative of the decedent, on a computed amount of income, part of which is a fictitious income which the decedent never received and the estate has not and never will receive. For example: if a decedent received $30,000 fully taxable income, as salary between January 1, 1922 and March 30, 1922, and died on March 31, 1922, the computation of the tax under the provision of the law as interpreted by the treasury department would be as follows:

$ 30,000 × 12 = $360,000 for twelve months
360,000 ÷ 3 = 120,000 estimated on annual basis for three months.

Normal tax on $120,000
1,000 exemption (assuming decedent to be single; see Sec. 216 (f), Art. 305).

119,000
4,000 @ 4% = $160 normal tax

115,000 @ 8% = 9200 normal tax

$9360 total normal tax computed.

Surtax on $120,000

On $100,000 surtax = $22,460
On 20,000 " = 9,600

$41,420 total computed tax to be apportioned to three-twelfths of year.

Three-twelfths of $41,420 = $10,355, which is the actual tax levied under the present application of the law upon an income of $30,000 for three months of a year.

Under the former basis of computation the tax would be computed as follows:

$30,000 income, which is all actually received.
1,000 exemption

29,000
4,000 @ 4% = $ 160 normal tax

25,000 @ 8% = 2,000 normal tax
surtax on 30,000 = 1,440

$3,600 total tax

$10,355 = tax computed on annual basis
3,600 = tax computed on actual income

$6,755 = additional amount of tax imposed

by the annual basis method, which penalizes in this amount an individual for dying on March 31st.

A somewhat similar basis of computation was provided under the Act of 1918 for cases where a change in the method of computation was made by the taxpayer from a calendar year return to a fiscal year return or *vice versa.* It is hard to believe that any of the legislators intended that this provision in the law should apply to decedents, and it is doubtful that if any did intend it to apply, that such as did so intend had any conception of such an unjust application.

Other features of the federal income tax law which lead to confusion and neverending readjustment are the provisions with reference to gain or loss, and capital gain in dealing with the increment or loss on the sale of capital assets. These provisions are found in the Revenue Act of 1921 as follows:

Section 202—Basis for determining gain or loss.
Section 206—Capital gain.

In view of the fact that no excess profits tax now applies to corporations for which the normal income tax is 12½%, it was more or less a natural and logical result that the tax on capital gain for individuals should be reduced by the elimination of high surtaxes and the application, if so elected by the taxpayer, of a maximum 12½% rate on capital gain from the sale of assets owned for more than two years.

But with reference to the whole question of a tax on gain from the sale of assets there is now in process of application under section 202 of the Revenue Act

of 1921 and under an increasing number of court decisions, a set of laws, rules and regulations which in an innumerable number of cases are unsatisfactory to both taxpayer and government accountants. Many hours are wasted by the taxpayer in an attempt to render honestly an involved accounting of his transactions in securities, under a necessity of classifying and reclassifying for technical accuracy. The same or a larger amount of time is wasted by government accountants in an effort to check up and upset figures which have been carefully and honestly prepared but which perhaps it is impossible to complete in every technical detail because of loss of original records made from one to fifty years before. It is more than probable that the administration of sections 202 and 206 of the Revenue Act of 1921 will cost more to the government than the amount of tax collected under them and will waste more value in time for both taxpayer and government by many times than the amount of tax which can ever be collected upon re-examination.

The tax on the increment of assets of an investor is unjust. It has never been adopted in Great Britain, where the income tax has had a trial of many years, nor has it been countenanced in France where the income tax has had a reasonable trial. Under all the revenue acts of the United States such a tax has been levied and the particular wording of the federal income tax amendment and of the revenue acts in question has been held by the United States Supreme Court to give the right to impose such a tax.

The injustice lies in the fact that an increment accumulated over a period of many years may be taxed at a high surtax rate because the property is converted into cash in a given year and the net profit is arbitrarily attributed to the year in which the sale takes place. There is and could be no means of apportioning such profit over the period of years during which it accrued. Any such attempt would be arbitrary and would accomplish no more satisfactory results.

The only satisfactory solution is to abolish the tax on the increment of, and not allow as deductions losses sustained on sale of, such assets as are sold by the investor, whether individual, partnership or corporation, provided such assets are not part of the stock in trade from which an income is actually derived. The elimination of such a tax will undoubtedly increase the revenue of the government and will relieve the tax administration of the greatest burden it now carries because of the detailed and complex accounting required by the law, by the court decisions and by the treasury department's many and diverse rulings.

The abolition of such a tax will also stimulate the investor and will enable him to seek a more productive field of investment. Capital will be launched in new directions and business in general will not feel the hampering restriction now placed on productive capital.

The analysis of certain applications of section 202 as now in force and interpreted by articles 1561 and 1570 of Regulations No. 62 may help to reveal the complications which it may produce.

For example, subdivision (a), paragraph 2 of section 202 provides that one receiving a gift of any property (from a living donor) shall, when selling such property, use as a profit or loss for income tax purposes the difference between the original cost to the donor and the price for which sold, and if such value to be used as a cost is not ascertainable then the commissioner is given full power to arbitrarily set a cost value for the purposes of computation. Such a law is in itself impossible of any equitable application and with the multitude of gifts that are disposed of by individuals it at once produces anxiety for the conscientious and utter disregard by the rest of society. There may well be a doubt as to whether or not the increase in the value of property between the date of purchase by the donor and the date of receipt by the donee can properly be called income to the donee under the present statute. The donee received the full value of the gift at the time the gift was received, and no previous increment in value seems to be reasonably attributable to him as income.

Another result of the present confusion is that it is more often the conscientious individual, honestly endeavoring to fully comply with the law who is harassed by the government examiners who desire to obtain the credit of recovering a small additional amount of revenue from an honest but confused taxpayer.

Subdivisions (c), (d) and (e) of section 202 of the Act of 1921 deal with the exchange of property for property and the regulations (articles 1564 to 1568 of Regulations 62) have been amplified by several rulings which attempt to clarify the situation with reference to the exchanges of property in which there is no taxable profit until the sale of the property received in exchange. The ruling in bulletin 32, page 1, of the bureau of internal revenue, dated August 7, 1922, attempts to set up a line of demarcation between taxable profits and non-taxable exchanges, but concludes with the statement that in all cases where there is a doubt as to whether the transaction is a sale or an exchange the facts should be submitted to the bureau of internal revenue for a determination of the matter. In view of the confusing phraseology and complex expression of the law the difficulty of any concise or clear-cut interpretation by the treasury department is obvious, but the taxpayer is the one to suffer and will not know until the statutory period has elapsed whether he has done right or wrong. He may be reversed at any time, and perhaps long after the transaction in which he was involved is forgotten he will be called upon for an additional tax. If a ruling is asked in advance on a given state of facts which are of general interest to the public, the taxpayer is informed that no ruling will be given until the transaction is closed and he must take his chances in an uncertain case and then expect an adverse decision if the department has the slightest doubt as to the case. His only remedy is in court and most often the amount involved does not warrant the cost of a suit.

The profit on the sale of rights, now computed in accordance with the decision in the case of the *Safe Deposit and Trust Company of Baltimore, Guardian* v. *Joshua W. Miles, Collector* (affirmed by the United States Supreme Court May 29, 1922) adds to the complications of detailed accounting and further bewilders a taxpaying public. Under this decision the amount received on the sale of rights to subscribe for new stock is apportioned to old and new stock (to be issued) and only a proportionate amount is taxable. The method now to be followed is set forth in treasury decisions 3402 and 3403 (dated October 18, 1922) which amend respectively article 39 of Regulations 45 (Act of 1918) and article 39 of Regulations 62 (Act of 1921), but the taxpayer is still left in doubt under the treasury decision as to what value is to be used for his old stock in case of future sale, whether the original stock was purchased before March 1, 1913 or purchased after that date. Also if "rights" are again issued, as has frequently happened, he may assume that he will use a reduced value under the first apportionment for his second apportionment of "rights", but there seems to be no assurance that the treasury department will sustain him under anything which is contained in the decision cited. Further, if the taxpayer holds original stock, part of which was a gift (cost to donor unknown), and part of which was inherited, and he receives "rights" to subscribe to new stock and sells them, there at once arises a complicated situation which the commissioner must settle after the taxpayer has paid a tax of some sort, and the commissioner (and his deputies) has several other matters to attend to.

That progress is affected by the present tax laws is obvious. That time is wasted by their detailed requirements is equally apparent. That productive development is often prevented by their uncertain application is likewise evident. Revenue must be had to turn the wheels of government, but the same or a greater amount of revenue can be obtained without the waste involved in the friction of unnecessary machinery required for a vast amount of needless detail.

"The power to tax involves the power to destroy; . . . the power to destroy may defeat and render useless the power to create."

DECISIONS AND RULINGS

EDITED BY A. E. HOLCOMB

Federal Taxes, Collection of—Distraint of Property Claimed by One Other than Taxpayer. — In a suit by a person claiming ownership of property, to prevent the sale thereof under distraint by the collector of taxes of one other than the person in possession, evidence of possession of the property when distrained, which consisted of the furnishings of a hotel conducted by the plaintiff, was held proof of ownership and right of possession, which imposed on the collector the burden to justify the seizure, by a preponderance of evidence, showing that the property belonged to the taxpayer.

The tax lists returned by the taxpayer to the local assessor of property, which included the property seized, were held incompetent.

An injunction was held to lie, to prevent seizure and sale of property of one person for taxes owing by another, when such sale threatens disruption of the plaintiff's going business, resulting in irreparable injury. Such a suit is not one against the United States, but against an officer who, in the discharge of a ministerial duty, is committing a trespass on plaintiff's property, without authority, the prohibition contained in § 3224 R. S. applying to suits by taxpayers only and to persons and things within the scope of the revenue laws.

Section 934 R. S. prohibiting the replevying of property taken by an officer, under authority of any revenue law, does not prevent the owner of property seized for taxes of another, from bringing any other proper action to determine the ownership. — *Long* v. *Rasmussen,* 281 Fed. 236.

Transportation Tax, Federal—Municipal Ferries. — The operation of a municipal ferry by King County, Washington, for the benefit of the public, was held to be a strictly governmental function, and it was held that the federal tax on transportation by the ferry, although not imposed directly on the county, but upon the passengers, would operate as an interference with and a burden upon a state governmental function, the charges being one of the means for defraying the cost of maintaining the function.—*United States* v. *King County,* 281 Fed. 686.

Excise, Federal — "Soft Drinks"—Cider.—The circuit court of appeals, reversing the district court, held that sweet cider or unfermented apple juice was not a "soft drink" within the meaning of the provision of the revenue act of 1918 imposing an excise tax upon beverages. The court after reviewing legislation both previous and subsequent to the 1918 act said that it was fully satisfied that sweet cider was not subject to the tax, and that Congress had not expressed its intention to tax sweet cider in that clear and unambiguous language which must be present before it could be held that a particular article of commerce was subject to a tax statute, which did not name it specifically and which comprehended it only by giving a meaning to the language used, which neither the history nor the structure of the statute justified. — *Monroe Cider, Vinegar & Fruit Co.* v. *Riordan,* 280 Fed. 624. See *Bul.* VII, 90.

Inheritance, Federal—Gift in Contemplation of Death — Credit for Overpayment Considered as Involuntary Payment.—A decedent, shortly before his death, made an absolute gift of a small portion of his securities to his wife. It appeared that it had been his custom for years to give the income from such securities to her and that he often expressed his intention to give her the principal. The gift was made just after he had recovered from a serious illness, and after the doctor had discontinued his attendance. Shortly thereafter, another illness developed which proved fatal. The federal government claimed that the gift was made in contemplation of death and was therefore subject to the estate tax and made an additional assessment. The district court held that the facts and circumstances overcame any presumption arising under the statute that the gift was made in contemplation of death.

Upon the audit of the return an overpayment in the tax as originally fixed had been disclosed, and the commissioner applied the overpayment to the additional tax assessed as above noted. The balance of the additional tax was paid under protest and the suit in question was brought to recover the full amount of the additional tax. The government contended that as the overpayment disclosed on the audit was not made under protest it was a voluntary payment and could not be recovered. The court held that the action of the commissioner in applying the overpayment in payment of part of the additional tax was unauthorized, arbitrary and coercive, and rendered the payment under protest of the entire additional tax involuntary and authorized the recovery of the total amount thereof, which, in effect, gave a recovery of the overpayment of the original tax.—*Vaughan et al.* v. *Riordan,* 280 Fed. 742.

Car Company — " Unit Rule " — Interstate Apportionment—Methods of Valuation. — The validity of an assessment of an interstate sleeping car company under the Wisconsin statute was exhaustively considered by the court of that state which rendered an opinion covering a wide range of matters such as are usually involved in the assessment of public service corporations, with elaborate citation of authorities.

The statute provides the usual requirements as to report of capital stock, property and mileage, and contains the customary drag-net clause as to " such other information, etc." It requires a valuation of the " entire property in the state " by first finding the value of the entire capital stock invested in the business, from which deduction for outside real estate and property not used in the business is made, the balance being apportioned to the state on a mileage basis. These provisions are qualified by a further provision permitting the tax commission to " consider " such other matters as will aid it in making a " substantially just and correct determination of the valuation of so much of said property as is subject to taxation in this state."

A tax levied pursuant to these provisions was not paid and the state brought action to collect the same. In the lower court the complaint was dismissed and the state appealed.

The defendants maintained that its routes in Wisconsin were wholly distinct from other routes in other states; that it had large amounts of real estate and personal property entirely outside the state and wholly disconnected with its business in Wisconsin, which gave value to its capital stock; that the ratio of wooden cars to steel cars was substantially greater in Wisconsin than the average of all its cars; that the revenue per car mile in that state was less than that on all lines everywhere. The company also urged that the so-called " stock and bond " method was inapplicable, because too uncertain and too delusive to be reliable, as it produced a result having no necessary relation to the actual value of the property. From these allegations defendant claimed that the " unit rule " could not be applied in reaching its assessment, as to use it would result in valuing property entirely outside the state, and property having no connection with its business in Wisconsin.

In making the assessment, the tax commission applied four general methods. It ascertained the ratio of the book value of the sleeping car property to the book value of the entire property; of the actual value of the sleeping car property to the actual value of the entire property; and of the gross earnings from the sleeping car business to the total gross earnings. These respective ratios were applied to the market value of the entire stock and the result was apportioned to Wisconsin both on a track mileage and car mileage basis. It also capitalized the net earnings from the sleeping car business, and apportioned the result on a track mileage and car mileage basis. The highest assessment indicated under the above methods was $2,247,330 and the lowest $1,440,040, and the assessment made was $1,800,000.

The court upheld the assessment, and in disposing of the various contentions of the company held that the term " entire amount of the capital stock " used in the statute included the entire property of the company, tangible and intangible; that the statute was not invalid because it did not prescribe a definite method for determining the value of the entire property; that in arriving at such value, the value of the stocks and bonds, and the capitalization of

net earnings were important elements to be considered and that the determination of the rates to be used for capitalizing net earnings was a matter within the discretion of the commission, which it would not review; that the taxation of property under the unit rule did not impose a burden upon interstate commerce; that while there was no actual physical connection between the different portions of the company's sleeping car property, there was nevertheless such a unity of use under a single management as justified the adoption of the unit rule for its assessment. It observed that in the taxation of large corporations, the administration of tax laws was so difficult that some general system of assessment and taxation must be adopted, which would be upheld, unless great injustice resulted; that the mileage apportionment basis, in the absence of special circumstances, was proper; that the circumstances relied upon to support the claim that the mileage basis was improper were inadequate for such support and that issued stock held in the treasury of the company represented property used in the business and should therefore be included in the total capital stock value. — *State* v. *Pullman Co.,* 189 N. W. 543.

"Unit Rule" Assessment—Traction Company's Own Bonds Held in Sinking Fund.—An Indiana traction company issued bonds, secured by a mortgage of its property and to secure payment thereof, was required to pay a certain annual amount to a trustee, as a sinking fund. The trustee was required to use the sinking fund, to acquire outstanding bonds in the open market. The bonds so acquired were not cancelled but were stamped " Not negotiable; property of the sinking fund " and the traction company continued to pay the interest thereon to the trustees, which was used in acquiring additional bonds. In its annual report to the state board of tax commissioners the traction company showed the bonds held in the sinking fund as outstanding and the interest on such bonds was deducted as an operating expense, thereby reducing the net income, as well as the assessed value of the company's property which was determined therefrom. Neither the traction company nor the trustee listed such bonds for a number of years, and an omitted assessment was made by county tax officials against the trustee. The court held that such bonds were not cancelled but were outstanding, as was indicated by the company's report, and were taxable.

It was contended that the bonds, if taxable, were the property of the traction company and therefore should have been assessed to such company as part of its " unit property ". The court held that such bonds had nothing to do with the daily operation of the company but constituted " other personal property than rolling stock " which was required to be assessed by the local tax officials, and that such bonds, having a definite location in the hands of the trustees, were taxable to it.—*In re Indiana Trust Co.*, 135 N. E. 807.

Railroad — Track Jointly Owned Taxed as Railroad.—Four railroad companies in Illinois built at joint expense a track connection for interchange of freight, each company owning an undivided one-fourth interest therein. The property was assessed as an independent railroad, although it had been included in the schedules of the companies owning the same and had not been returned as a separate railroad. Objections were entered against the assessment by one of the joint owners, on the grounds that it unlawfully increased the tax of complainant, as the line was being treated as main track instead of side track, as listed; that it was unjust and lacked the uniformity guaranteed by the constitution; that it denied complainant the right to have its name as the real owner of said railroad track spread upon the public records, and violated its right to have its undivided interest in said track assessed separate and apart from the other owners.

The court, in passing upon the objections, held that the collection of a tax on the connecting track in question could not be enjoined as excessive because assessed as main line instead of side track, where it was not shown in the bill that the tax thereon was increased thereby, that there was any difference between the valuations placed on main and side tracks, or that the tax on complainant's rolling stock, which was taxed in the proportion that the length of main track in the county bore to the whole length of the road in the state,

or on its other property, would be increased thereby. The court held further that the bill did not disclose that the tax was not authorized by law; that it was assessed upon property not subject to taxation, or that the property had been fraudulently assessed at too high a rate and therefore the bill disclosed no right for injunction. The court dismissed the other alleged grievances and held that the fact that the property was assessed in the wrong name was not such an irregularity as would invalidate the assessment of the tax, indicating that no provision in the statute required property to be taxed in the name of the owner. — *Michigan Cent. R. Co.* v. *Carr, County Collector,* 135 N. E. 881.

Gross Receipts — Parent and Subsidiary Company.—Under the South Carolina statutes, a gross receipts tax is imposed upon public utilities. A traction and lighting company agreed with a power company to operate all of its property and to apply the earnings therefrom to the expenses of such operation, taxes, the maintenance of the corporate existence of the power company and the payment of the interest on its bonds and a six per cent dividend on its stock. The surplus remaining was to belong to the operating company. The operating company in its return failed to include or deducted from its receipts amounts credited the power company for power obtained from the use of the power company's plant, calculated at arbitrary rates fixed by the operating company. The power company included this same amount in its returns and paid tax thereon. The operating company claimed that its relationship to the power company was that of agent or trustee and that it was entitled to make the returns in such a way as to avoid double taxation of receipts from the power plant. The state's contention was sustained by the court, that the situation was that of lessor and lessee and that the tax was on "gross receipts", which meant the total receipts from the business, before any deduction for expenses.

The court further refused to allow a credit to the operating company for certain taxes erroneously paid by the power company, on the ground that the power company only had the right to obtain a reimbursement for taxes erroneously paid by it.—*Columbia Ry. Gas & Electric Co.* v. *Jones,* 112 S. E. 267.

Gross Receipts of Railroads during Federal Control.—The California court held that while the rule was well settled that receipts from transportation of the carrier's own transportation should not be considered in estimating the gross receipts of a railroad company for taxation, this rule did not apply to the value of the transportation furnished by the United States to itself during the period in which the railroads were under federal control, because the statute under which such control was taken provided that nothing contained therein should be construed as affecting the existing powers of states in relation to taxation.—*Payne, Director General of Railroads* v. *Richardson, State Treasurer,* 207 Pac. 547.

Taxes as Operating Expenses.—In a Maine case involving the fixing of rates to be paid by a town to a water company, an order of the public utilities commission that the town should repay to the company the amount annually collected by it as taxes upon the property of the company was held to be unauthorized, the court holding that the rates should be certain and definite, and not subject to fluctuation by reason of the acts of some other body, as in this case the town and its board of assessors. The court held taxes to be a part of the necessary operating expenses of the utility, to be borne by all the consumers in proportion to the value of the service received by them, and not by all the taxpayers of the town, whether users of the service or not, as would be the result if the entire tax were taken out of the municipal rates, in accordance with the order of the public utilities commission.—*In re Caribou Water, Light & Power Co.,* 117 Atl. 579.

Interstate Commerce—Films Leased in Another State. — The federal court held that films shipped by a corporation from New York to its warehouse in Nebraska, and from there leased by its agents to customers in that state, did not constitute articles employed in interstate commerce, since such films had come to rest, when they reached the warehouse.—*Binderup* v. *Pathe Exchange,* 280 Fed. 301.

INTERSTATE COMMERCE.—In a criminal case the federal court held that intra-state commerce was that commerce which, during its whole transportation, was within the jurisdiction of a single state and that a shipment originating in one state, consigned to a point in the state but moving in its course through another state constituted interstate commerce.—*Yohn* v. *United States,* 280 Fed. 511.

CORPORATION TAX IN RHODE ISLAND NOT RETROACTIVE. — In a Rhode Island case the question was whether a corporation which was dissolved and had ceased to do business December 31, 1919, was liable for a corporate excess tax assessed against it June 1, 1920 by the board of tax commissioners. The court held that the statute under which the tax was assessed was not intended to have a retrospective effect and that as the corporation had not carried on business in the state at any time during the year 1920 it was not liable for the tax assessed.—*Jennings, Gen. Treas.,* v. *United States Bobbin & Shuttle Co.,* 117 Atl. 647.

BANKS — ASSESSMENT OF SHARES IN MISSOURI — DEDUCTION OF MORTGAGED REAL ESTATE AND ALSO OF THE MORTGAGE INDEBTEDNESS.—The Missouri statute provides for the taxation of the shares of banks and other corporations by ascertaining the true value of all the shares, and the surplus and undivided profits, and deducting therefrom the "value of real estate, if any, represented by such shares." A bank listed its real estate at its book value and its surplus and undivided profits, obtained by deducting its indebtedness, which included the amount of the mortgage on said real estate. It deducted from the total of these items the full value of the real estate. The county board increased the amount listed by the amount of the mortgage indebtedness, claiming that the bank's shares did not represent the real estate, to the extent of such indebtedness. The court rejected this claim and quashed the increase. It reached this result apparently upon the principle, as it says, that the shares of stock represented the value of "all the assets of the corporation," citing 14 C. J. 385, and *State* v. *Brinkop,* 143 S. W. 444. Starting with this principle the court readily held that to deny the deduction of the full value of the real estate would result in double taxation, as the shares and surplus reflected such value and were taxed at their full value. The consequence of deducting the mortgage indebtedness in arriving at the surplus was not seen to result in a double deduction, it being held that the result of not deducting such indebtedness would be to make the value of the stock "to that extent, inflated and fictitious".

It is difficult to follow this reasoning, which apparently resulted from a consideration of prior decisions interpreting the statute in question, but the decisive consideration seems to have been that the stock of a corporation represents all of its assets, a proposition difficult to accept, in the case of a corporation having a substantial amount of mortgage or other permanent indebtedness.—*State* v. *Buder,* 242 S. W. 979.

BANKS — DEDUCTION FOR BUILDING ON LEASED LAND — ACCRUED INTEREST ON DEPOSITS.—In Indiana, shares of stock of banks are assessed at cash value less a deduction for investment in real estate and for bona fide indebtedness. A bank resisted an assessment of its stock claiming a deduction for its investment in a building constructed by it on land held under a long-term lease and for its indebtedness, consisting of accrued interest on deposits. The court held that buildings constructed on leased land were personal property under the statutes, and therefore the bank was not entitled to a deduction for its investment in such building. It held that the indebtedness, representing accrued interest on deposits, was a proper deduction. —*Sims* v. *Fletcher Savings Trust Co.,* 136 N. E. 26.

INSURANCE—TAX ON PREMIUMS—DIVIDENDS APPLIED TO PREMIUMS. — In Missouri, the court held that the tax imposed upon insurance companies of 2% upon the premiums received, whether in cash or in notes, did not apply to dividends declared by the company, payable to the policyholders and which were applied by them toward their premiums.

In disposing of the contention of the state that great weight should be given to the construction which had been given to the statute by the department for a num-

ber of years and which was contrary to the contention of the insurance company, the court said that a departmental construction could only be invoked when the language of the statute was ambiguous or doubtful, which was not true of the statute in question.—*State ex rel. National Life Ins. Co. of Montpelier, Vt.*, v. *Hyde,* 241 S. W. 396.

Corporation Income, State—Nature of Tax—"Doing Business"—Tax Applicable for Portion of Year. — The Massachusetts court held that the corporation tax, based in part on net income and in part on corporate excess, is an excise tax for the privilege of doing business and not a tax on property or income; that it is levied for a past period of time and not for a future period; that the statute imposes a tax for a period less than a year, where the corporation ceases to do business; that the validity of the tax is not affected by the fact that the income period does not end with the date as of which the corporate excess is measured; that the provision declaring the tax upon a corporation going out of business during the year, to be due at the date fixed when such a corporation shall give notice of its retirement, applies to a tax not assessed at the time of retirement, and such a tax may be rightfully assessed for the period ending with such retirement.

The court held that the holding of a stockholders' meeting in the state was an act of carrying on business, rendering the corporation liable to the tax.—*Springdale Finishing Co.* v. *Commonwealth*, 136 N. E. 250.

Corporation Income, State—Nature of Tax — Improper Allocation of Profit to Interstate Business. — The Massachusetts court held that the declared purpose of the statute to enact an excise tax would be accepted, unless inconsistent with the meaning and effect of the enactment.

A foreign corporation doing both local and interstate business may not avoid taxation with respect to its local business, by so arranging its charges as to allocate its profit wholly to its interstate business.—*Judson Freight Forwarding Co.* v. *Commonwealth,* 136 N. E. 375.

Corporation Income, State—Connecticut Tax — Computation on Previous Year's Business Not Objectionable.— The court held that the Connecticut tax on the net income of corporations was an excise tax; that it was not open to objection, because based on the profits of the previous year, where the business was done after the statute was in force. The corporation in question had withdrawn from the state before the end of the previous year and claimed that the state had no jurisdiction to impose the tax in the subsequent year, because such imposition was a violation of the Fourteenth Amendment. The claim was rejected and the tax sustained. — *William A. Slater Mills Inc.* v. *Gilpatric,* 117 Atl. 806.

Income, State — Gain from Sale of Capital Assets.—In determining the taxable income of a Massachusetts taxpayer, the state included as income derived from the sale of certain stock, an amount which represented the difference between the selling price and the value of the stock on January 1, 1916, when the act went into effect, and when the value of the stock was much lower than the original cost thereof. The taxpayer claimed that the net income from the sale should have been based upon the difference between the original purchase price and the selling price, and asked for an abatement of part of the tax. The court allowed the abatement, holding that "income" should be given a broad meaning, and must be rationally construed and not stretched to include purely theoretical, as distinguished from practical conceptions, and that income as a subject of taxation imports an actual gain. — *Brown* v. *Long, Commissioner,* 136 N. E. 188.

Natural Resources—Production Tax — Iron Ore — Classification. — The Pennsylvania Supreme Court affirmed the decree of the lower court and sustained as constitutional the 1921 act imposing a production tax on anthracite coal.

The claim of *stare decisis,* by the decision of the court in *Commonwealth* v. *Alden Coal Co.,* 96 Atl. 246, was rejected, on the ground that the facts in that case were essentially different.

The main question turned upon the interpretation of the power to classify found in article 9, sec. 1 of the Pennsylvania con-

stitution and an elaborate and useful review of the subject is contained in the opinion. The contention made that "coal was coal" and that therefore there was no reasonable justification for taxing anthracite coal and not bituminous coal, was rejected, with a wealth of argument, in which essential differences between the two substances are recited and the function of a court in dealing with legislation, passed under constitutional authority such as was found here, profoundly expounded, with appropriate citations.

The claim that the act violated the commerce clause of the federal constitution was held to be wholly met by reference to the decision in *Crescent Cotton Oil Co.* v. *Mississippi,* 257 U. S. 129; *Bul.* VII, 92, and the contention of denial of equal protection was held completely answered by a quotation from *Dist. of Columbia* v. *Brooke,* 214 U. S. 138, at p. 150. Substantial dissent was voiced by the Chief Justice and one associate Justice.

Argument of the appeal from this decision has already been made in the United States Supreme Court and its decision will establish the law as to the important questions at issue. An unusual spectacle in a tax case was presented, in that all the New England states, with New York, New Jersey and Delaware requested and were granted permission by the court to file briefs and present oral arguments against the tax.—*Heisler* v. *Thomas Colliery Co.,* 118 Atl. 394. See *Bul.* VII, 194. Affirmed by U. S. Sup. Ct., Nov. 27, 1922.

Severance Tax — Sales of Furs of Wild Animals. — Under the Louisiana statutes, dealers in furs of wild animals are subject to a severance tax of two per cent of the value of the furs purchased by them. The tax was resisted on various constitutional grounds, but was sustained, the court holding that the tax was imposed under the police power of the state, to which the constitutional requirement of uniformity in taxation did not apply; that the imposition of the tax on dealers and not on trappers was not an arbitrary or unreasonable exercise of the police power or an unwarranted interference with a lawful business and did not constitute denial of the equal protection of the laws, since the state in the exercise of its police power for the preservation of its natural resources was not subject to restraint under the constitutional provisions for the general protection of the rights of life, liberty and property; that the tax was not in violation of the commerce clause of the federal constitution as levying a tax upon exports, since it was imposed under the police power of the state; and that the state might delegate such part of its police power to one of its departments, as was necessary, in the enforcement of its police regulations. — *Lacoste* v. *Department of Conservation of State of Louisiana,* 92 So. 381.

Reassessment — Authority of State Tax Commissioner over Local Assessors. — A proceeding by the State Tax Commissioner of West Virginia against a county assessor in that state, to compel the latter to perform his duties under the law, involved the validity of certain provisions of a statute vesting the state tax commissioner with power to order a reassessment in case of neglect, failure, or refusal of any assessor to make such valuation, and to appoint special assessors to make such reassessment. The county assessor disputed the right of the state tax commissioner to correct errors and omissions in the work of his office through temporary and special assessors, asserting that the right was vested in the assessor by the constitution to exercise the full power of assessment, in the first instance, to the exclusion of all other officers and tribunals.

The court held that the state constitution did not confer upon assessors full and exclusive power and authority over the assessment of property, for purposes of taxation is their respective counties; that properly interpreted, the constitution made assessors agents or instrumentalities, in the hands of the legislature, for the execution of its sovereign power of taxation and of the constitutional mandate requiring equality and uniformity in taxation. The court held, further, that the legislative purpose in the enactment of the statutory provision in question, was to prevent inequality in assessments and that the federal and state guarantees of due process of law were not violated by the procedure authorized by the statute. Being of the opinion that the statute was valid, and that the assessor's return failed to show due performance of duty, the court, without deciding whether

interference could be defeated by proof of full performance of his duty by the assessor, awarded a peremptory writ, requiring him to deliver the books and papers of his office to the special assessor, for use in the reassessment ordered.—*State ex rel. Hallanan, State Tax Com'r,* v. *Rocke, County Assessor,* 113 S. E. 647.

Reassessment—Power of State Tax Commission.—A county in Kentucky contended that the state tax commission had no authority to make a reassessment of the property of the county, for purposes of taxation, or to send its representatives into the county for the purpose of making such reassessment. The county also claimed that the county board of supervision was vested with quasi-judicial functions in the review of assessments, and that this board, having performed its duties, its conclusions could not be overturned by the state tax commission or in any way, save by appeal by an individual taxpayer.

The court held that the state tax commission had not only the power to equalize the assessed value of property in the various counties, but by pursuing the course pointed out by the revenue laws, might enforce the same, either directly or through the courts; that the board was acting within its legal rights when it gave notice to the county, in the manner directed by the statutes, of a tentative increase of certain classes of property, and fixed a day on which to hear representatives of the county upon the proposed increase, and after hearing such evidence made a final increase, concerning which it gave notice. The court held further that the county, having failed to appeal to the courts in the time, way, and manner provided in the statutes, lost its right to appeal, and the valuation made by the state tax commission became final and conclusive upon the county, and it was bound to reassemble its board of supervisors and reassess and equalize the classes of property to conform to the amount fixed by the commission. In making such equalization, the court held that the board of supervisors were required to give notice to each taxpayer whose assessment was increased, and to fix a time and place for hearing, and from the increase as finally fixed the individual could appeal to the courts. The state was held to have no power to impose upon a county the cost of a reassessment made by the state tax commission, and the state tax commission was held to have no authority to make a reassessment of property in a county by sending into the county its representatives, to make a house-to-house canvass of the taxpayers, because of the statute providing for judicial review in case the county was dissatisfied with the increase ordered made by the state board, which accomplished the same purpose in a more economical and efficient manner. The court, therefore, held that under the circumstances of this case, the state tax commission could by mandamus require the county board to comply with its orders. —*Fayette County et al.* v. *Wells et al.,* 243 S. W. 4.

Assessments—Power of Tax Commission.—A taxpayer in Missouri brought suit to compel the state tax commission to hear evidence as to the irregularity of the assessment of lands in a certain county in that state, and to grant relief from an assessment which he claimed had been inequitably made. It was maintained that the state tax commission was legally bound to adjust inequalities in the individual assessments in the several counties in the state, and that this might be done after the state equalization board had met and equalized the assessments as to the several counties in the state.

The court held that the commission had no authority to interfere with any of the agencies of assessment in the state, from the assessor to the state board of equalization; that the state board of equalization had the exclusive constitutional right to equalize assessments as between counties, and that the decision of that board was final; that the jurisdiction of the state tax commission was advisory merely and that it was right in declining jurisdiction in the case presented. The court held that the commission had no authority to adjust inequalities in individual assessments after the state board of equalization had acted and that after that board had acted, the assessment for the year was complete, and further change could not be made.—*State ex rel. Laclede Land & Improvement Co. v. State Tax Commission of Missouri,* 243 S. W. 887.

ASSESSMENTS — REVALUATION AT INSTANCE OF THIRD PARTY.—A Texas railroad company, having been assessed by the tax assessor, an improvement district board appeared before the board of equalization and objected to the assessment as inadequate, but the equalization board confirmed the assessment. Thereafter the improvement board brought proceedings, in which the assessment was declared invalid and the equalization board was directed to make a revaluation. The company was not a party to the proceedings, and thereafter resisted the tax upon the increased valuation. The court held that under the statutes the action of the equalization board confirming the assessment was final; that in the absence of a statutory provision authorizing procedure such as was taken in this case, individual assessments, even though arbitrarily or fraudulently made, were not subject to such treatment; that the writ of mandamus was improperly issued, and the tax was illegal.—*Chicago, R. I. & G. Ry. Co.* v. *State,* 241 S. W. 255.

ASSESSMENT—TAXPAYER'S STATEMENT.—In a suit in Montana to recover an amount of taxes paid under protest, upon an arbitrary assessment made by an assessor, covering solvent credits, the court held that where the taxpayer had made a statement to the assessor of his property subject to taxation, informing him of a checking account which the assessor did not then include in the assessment statement prepared by him, the assessor was not authorized to make an arbitrary assessment, but should have proceeded to ascertain the facts as to the statement made to him. The court held, further, that it was not necessary for the taxpayer to file a claim with the board of county commissioners before commencing action to recover the taxes paid under protest. — *Story* v. *Dixson, County Treasurer et al.,* 208 Pac. 592.

MINERAL RIGHTS — RULE FOR ASSESSING LAND OWNED JOINTLY.—A Louisiana landowner was assessed for his land including its entire oil-producing value, although he had sold all but one sixteenth of the oil-producing rights in one part of the land and all but one thirty-second in another. The assessment was determined by multiplying the settled oil production of the wells in the land as of January 1st by the market value per barrel of the oil on that day, and the result was added to the ordinary value of the land. The court approved this method but reduced the assessment to an amount which reflected the landowner's interest. The court held that only the mineral rights belonging to the landowner should be assessed to him, together with the value of the land; that mineral rights which he had sold were not assessable to him, and that the correct rule for assessing land which was owned jointly, but in unequal proportions, was to assess each fractional part to its owner.—*Shaw* v. *Watson, Tax Assessor,* 92 So. 375.

ASSESSMENT — NOTICE OF INCREASE—DUE PROCESS.—A county board of tax assessors in Georgia increased the valuation returned for taxation by an individual, without giving him any previous notice. The action of the board was taken under the Georgia tax equalization act. This act empowered the county board to assess property for taxation and required it to notify the taxpayer of changes made in his return, and gave him, if dissatisfied, the right to demand an arbitration.

The taxpayer brought suit, contending that the tax equalization act was unconstitutional in that it failed to provide for a notice and hearing before the increased assessment was made upon his property, and was violative of the due process clauses of both the state and federal constitution; that the increased assessment was illegal in that it was confiscatory and that the levy was void, for various alleged administrative irregularities.

The court observed that the tax equalization act provided for a hearing and an arbitration before the tax became irrevocably fixed, and held that as the taxpayer had not asked for an arbitration, he could not complain of a want of due process of law, and therefore upheld the constitutionality of the act in question. It also held the other exceptions were likewise without merit. — *McGregor* v. *Hogan,* 112 S. E. 471.

ASSESSMENT — NOTICE OF INCREASE—PAYMENT UNDER DURESS. — A Tennessee assessor assessed certain property and subsequently a county board of equalization raised the assessment, without notice to the property owner, although the statutes re-

quired such notice. The property owner paid the tax under protest, a few days after it was delinquent and when his personal property was subject to seizure, and brought suit to recover such tax. The court held that the assessment was unlawful, because of the failure to give notice of the increase and that the payment of the tax under protest was not voluntary but made under duress.—*St. Louis Basket Box Co.* v. *Lauderdale County,* 241 S. W. 99.

Assessment—Purchaser Not in Possession on Assessment Date.—A trustee in bankruptcy in a city in Wisconsin conducted a public sale of property on May 1st, and accepted, subject to the confirmation of the court, a bid made by a company. Such confirmation was ordered on May 2nd, and on that date the company paid the purchase price, took possession of the stock of goods, and received a bill of sale. An assessor made an assessment of said property as of May 1, against the purchasing company. Suit was brought to recover taxes paid under protest on said assessment.

The court held that under the Wisconsin statute the stock of goods in question should have been assessed to the trustee on May 1, as he continued to hold the key and had declined to give possession; that title did not pass until May 2. It held, however, that the plaintiff company was prevented from maintaining its suit by its neglect to present objections to the board of review.—*Herzfeld-Phillipson Co.* v. *City of Milwaukee,* 189 N. W. 661.

Mortgages—Real Estate. — A Colorado taxpayer sought to recover taxes paid upon an assessment of mortgage loans held by him. The statutes required real estate encumbered by a mortgage to be assessed as a unit, and provided that mortgages should not otherwise be assessed. The county claimed that the statute violated the constitutional provision requiring all property to be assessed, as mortgages were separate property and could not be exempted from taxation. The court, in holding the tax invalid, declared that the direct taxation of mortgages would amount to double taxation; that the assessment of the mortgaged property included the mortgage, and that the legislature had power to classify mortgages as part of the real estate.—*Board of Commissioners of Washington County* v. *Murray,* 208 Pac. 472.

Growing Crops — Separate Assessment — Joint Producers. — Under the Louisiana statutes crops growing or gathered, while in the hands of the producer or his agent, are considered as attached to the land and may not be separately assessed. An irrigation company, which furnished water for irrigating land, cultivated by farmers, received as compensation a part interest in the crops. A tax was imposed on the crops so received. The court held that the company was a joint adventurer in the production of the crops, which were not separately taxable.—*Riverside Irr. Co., Limited* v. *Louisiana Tax Commission,* 92 S. 854.

Situs — Intangible Property—General Discussion. — The city of Austin, Texas, brought suit against a domestic life insurance company to collect taxes alleged to be due on certain promissory notes deposited by it under the laws of the state with the state treasurer. The principal question involved was the constitutionality of a portion of the act under which the deposit was made, declaring the securities so deposited to be taxable at the home office of the insurance company.

The company claimed that this clause was in violation of the constitution of the state, which declared that all property of corporations should be assessed for taxation, and the taxes paid in the county " where situated ".

The court referred to the primary and fundamental rule that no sovereignty or taxing district might exercise the power of taxation, except as to property actually or constructively within its jurisdiction, and held that the constitutional clause in question merely declared the common-law rule and did not purport to define what was meant by the words " where situated ".

The court entered into a discussion of the principles of common-law which govern the situs of property for taxation, as developed and applied in this country to real estate and personal property. It observed that visible and tangible personal property, as well as certain kinds of intangible property, having similar characteristics, as, for example, money, state and municipal bonds, circulating bank notes, and shares of stock in private corporations, might have a situs for taxation where they were permanently kept, which might be a place other than the domicile of the owner, but

that the general rule was that property of an intangible nature, such as credits, bills receivable, bank deposits, promissory notes, mortgage loans, judgments, and corporate stock, had no situs of its own for purposes of taxation, and was assessable only at the place of the owner's domicile, regardless of the actual location of the evidence of the debt or the security named.

The court observed further that such securities might have a business situs, separate and apart from the domicile of the owner, at which they might be taxed, when they constituted capital invested in a business at such place, or were used as an instrumentality of such business; but that such situs would arise only by legislative acts. As instances, it was pointed out that the state had authority, in authorizing the creation of corporations, to require the payment of taxes at their domicile on all shares issued, whether owned by residents or non-residents; that bank deposits might be taxed where they had acquired a business situs, or where actually kept, although this did not preclude their taxation also in the state of the depositor's domicile.

The court held that the use of the words "where situated" in the state constitution did not determine and fix the taxable situs of the property at a place other than as provided by the common law rules; and that the act fixing the taxable situs of the personal property in question as the domicile of the company was constitutional and must be upheld.—*Great Southern Life Ins. Co.* v. *City of Austin,* 243 S. W. 778.

Exemption — Effect of Constitutional Provision for Exemption on Assessments for Current Year — Taxes "Accruing".—An interesting case arose in Louisiana, involving the effect of the clause in the constitution of 1921, exempting certain credits from taxation, on assessments which were in process of completion when the constitution became operative.

The constitution became generally effective July 1 "save and except as otherwise provided" therein. Another clause provided that all taxes "due, owing or accruing . . . except as otherwise herein provided shall remain unaffected by the adoption of this constitution."

On July 1, the assessor had completed his work of listing but there remained many steps before the assessments were final, after which the amounts of taxes were to be computed and the rolls filed with the collector for collection.

The court originally held that the exemption took effect for 1921, as the taxes had not become due and payable on July 1, and hence the constitutional clause arrested further steps toward the assessment and taxation of the credits in question. On rehearing, however, it reversed its holding and declared the constitutional cause not effective, with respect to credits, which had been assessed as of January 1.

It reached this conclusion partly upon a consideration of the distinction between an assessment and a "levy", holding that taxes were *levied* as of January 1 of each year, under the general tax act; that the process of assessment was a different thing, which was not intended to be arrested as to taxes already *levied*. The word "accruing" in the saving clause above quoted was, however, held to be decisive, as indicating the intent to specifically reserve taxes which had already been levied and which were therefore "accruing" at the date when the constitution was made effective, and to prevent them from coming within the scope of the constitutional provision for exemption.

The original judgment granting plaintiff taxpayer a mandamus requiring the assessor to strike from the rolls the assessment covering the credits in question, was annulled and mandamus denied. — *State* v. *Jeter,* 92 So. 594.

Exemptions — Educational and Charitable Institution—"Labor Temple". — A non-profit or general welfare corporation of Tennessee had legal title to property known as a labor temple, the beneficial ownership being held by a number of local unincorporated labor unions, which had contributed all the money to purchase the property. A board composed of elected members from the participating unions controlled the property, and the expense of maintenance was derived from rentals paid by the various unions for rooms set apart for their use. At the meetings of the union, lectures and instruction relating to various crafts were given by members voluntarily without remuneration, and a school of mechanical drawing was opened, free to all applicants. The purpose of the labor organizations, as shown

by by-laws, typical of all, was to elevate social, moral, and intellectual standards, etc.

A city claimed that the above facts did not bring the corporation in that class of institutions whose property was used exclusively for religious, educational, scientific, or charitable purposes, and that its property was therefore subject to tax. The corporation maintained that it was an educational and charitable institution in the sense and meaning of the constitution and the statute under which the exemption was claimed.

The court held the corporation to be an educational institution, but held that the fact that the local labor unions, who owned a beneficial interest in the corporation, dispensed charity to indigent members and their families in accordance with their constitutions and by-laws, did not render the corporation, in its corporate capacity, a charitable institution. The property of the corporation, considered as an educational institution, was held to be exempt from taxation by the city. The court held further that the fact that the corporation did not protest the assessment to the tax assessor, or to the city board of equalizers, did not estop it from challenging the assessment.—*Nashville Labor Temple* v. *City of Nashville,* 243 S. W. 78.

Exemption — Educational Purposes. —A religious organization in Nebraska owned farm lands and dairy property used in connection with its educational institution in that state. The county board of equalization assessed such property for taxation, on the theory that the farm and the dairy, considered by themselves, were not used exclusively for school or educational purposes, were a source of profit, and hence were not exempt. In opposition it was argued that the farm and dairy were used in carrying out a purpose of the school and were as useful for educational purposes as the equipment in class rooms; that the proceeds went into the general treasury of the school from which all disbursements were made; that the products inured to the benefit of the school as a whole and any profit therefrom was a mere incident of the general purposes for which the school property was used; that outside of school purposes no one received any pecuniary profit from the use to which the farm and dairy property were put.

The court held that the property in controversy was used exclusively for school purposes, within the meaning of the constitution and statutory provisions, and was therefore exempt from taxation. — *In re Central Union Conference Ass'n of College View,* 189 N. W. 982.

Exemption — Private Hospital. — A county board of equalization in Nebraska levied taxes on the property of a certain hospital located in a city of that state which had been founded and was owned by a religious society. Members of the society who had charge of the institution received nothing for their services beyond food, clothing and shelter. No individual, society or corporation received any pecuniary profit from the hospital property, funds or earnings. Surplus and donations were used for improvements, and extensions of service. The institution was open alike to charity patients and others, without regard to race or religious beliefs, and reasonable compensation was demanded from those able to pay for services rendered.

The court held that the property was used exclusively for religious and charitable purposes, and was therefore exempt from taxation. — *In re St. Elizabeth Hospital,* 189 N. W. 981.

License—Soft Drink Business—Police Power.—A Maryland town ordinance required persons conducting a place where soft drinks were sold to obtain a license, and the local authorities were authorized to refuse such license where the applicant was not of good moral character or the place in which it was proposed to carry on the business was not a proper one. Licenses were refused to a number of applicants and they brought mandamus proceedings to compel the issuance of such licenses. The court upheld the ordinance as a proper police measure, finding that it was a reasonable measure, well adapted to prevent the sale of intoxicating liquors, under the guise of the sale of soft drinks. The court also held that the ordinance was not in restraint of trade and did not tend to create a monopoly, since it did not appear that the applicants were men of good character, or that their places of business were proper ones.—*Springer-Kimmell* v. *Mayor and Commissioners of Town of Westenport,* 117 Atl. 748.

License — Brokers—Discrimination. —An action was brought against a tax collector in a county in Georgia to enjoin the collection of a tax levied under a general act imposing a flat license tax on brokers, salesmen and commission merchants.

The court had previously decided that the tax did not apply to brokers acting solely for non-resident principals and making only interstate deliveries. The taxpayer in question represented principals, some of whom were outside the state and who shipped goods into the state and some of whom were located in the state and made shipments wholly within the state. He urged that the tax upon him was discriminatory, on account of the exemption above noted.

The court rejected the claim and upheld the tax as being reasonably and lawfully imposed, not burdening interstate commerce or denying the equal protection of the laws. It held, further, that the act in question, as applied to brokers and salesmen representing both resident and nonresident principals, did not unjustly discriminate against them, and therefore refused to enjoin the collection of the tax.—*Raley & Bros. et al.* v. *Richardson, Tax Collector et al.,* 113 S. E. 531.

Motor Vehicles — Local County License. — An act in South Carolina provided for the registration of all vehicles in a designated county and imposed a license fee on the same, which differed for various kinds. The proceeds were to be used for the construction and repair of public roads. An attempt was made to impeach the validity of the act upon the grounds that the statute was special legislation, in violation of the constitutional provisions that in cases where a general law could be made applicable, no special law should be enacted, and requiring equality and uniformity of taxes, and denied due process and equal protection of the laws.

The court held the act not special legislation in violation of the constitution, since the constitution authorized the assessment and collection of taxes by counties uniform in respect to persons and property within the jurisdiction of the body imposing the same. The court also held that the contention that the tax imposed by the act was in violation of the equality and uniformity clauses of the constitution was equally untenable, since the license tax related to all persons in a class and operated uniformly on all therein. It was further held that the statute did not deny due process or equal protection of the laws, as alleged.—*State* v. *Touchberry et al.,* 113 S. E. 345.

Motor Vehicles — Jurisdiction of Public Utilities Commission. — Under the Connecticut statutes, persons or corporations operating motor vehicles for the transportation of persons for hire, are required to obtain a certificate from the public utilities commission. A person operating such a vehicle resisted the statute, claiming that it was unconstitutional, because it involved the delegation of legislative power to the public utilities commission and conferred unlimited discretion and arbitrary powers upon it, by failing to provide a standard to guide its rulings. The court upheld the statute, holding that the statute did not give the commission legislative power or an unregulated or unrestrained discretion, and that the legislature, in defining the duties of an administrative body, ordinarily could only provide general rules for its guidance, by defining certain ultimate facts, which it must find to exist before taking a certain prescribed action.—*State* v. *Darazzo,* 118 Atl. 81.

Motor Vehicles — Classification of Vehicles. — An act in Minnesota which became effective April 23, 1921, provided for the annual registration and listing for taxation of motor vehicles, with certain exceptions, using the public streets and highways of that state. For purposes of the tax, automobiles were classified, varying with the time used, and each class was taxed at specified percentages of the manufacturer's retail list price at the factory. The act provided that when a motor vehicle became first subject to taxation between July 31 and October 1, the tax should be one-half of the tax for the whole year, and if first subject to taxation after September 30, the tax should be one-fourth of that for the whole year. If the motor vehicle became first subject to taxation before July 31, the tax for the entire year applied.

An owner of an automobile which was purchased on April 30, 1921, and regis-

tered the following month, brought suit to recover a tax paid under protest, claiming that the legislature, in imposing a tax for the entire calendar year, when only a portion of the year remained after the enactment of the statute, had exceeded its powers, and imposed a tax that was not equal; that the act contravened the constitutional requirement of uniformity, because certain vehicles were exempt from the tax in question, and because it arbitrarily fixed the value of an automobile for the first three years at its listed retail price.

The court held that the legislature had not exceeded its powers in requiring the owner in question to pay a tax for the entire calendar year; that the requirement of payment of only a portion of the tax on motor vehicles becoming first subject to taxation at specified times of the year, did not violate the provision of the state constitution requiring uniformity in taxes. The court held, further, that it was within the power of the legislature to classify automobiles for taxation on one basis and farm tractors and the like, on another; that the classification was not so arbitrary or unreasonable that it could not be sustained without violating the constitutional requirement of uniformity; that the provision dividing automobiles into classes, varying with their ages, and taxing each class at specified percentages of their list price at the factory, was not violative of the uniformity clause of the constitution, neither was that clause contravened by a provision of the statute making the retail list prices the basis for the computation of the tax.—*Dohr* v. *Holm,* 189 N. W. 418.

Public Purpose — Distribution of Serum. — A Nebraska statute authorized the state university to establish a plant for the production of a hog cholera serum and to distribute such serum to farmers and swine growers at the actual cost of production, and appropriated a certain sum for such purpose. A taxpayer brought suit to enjoin the university from manufacturing and selling such serum, claiming that the statute was class legislation and granted exclusive privileges, in violation of the constitution. The court sustained the statute, holding that it was for the protection of the sources of food supply, which was a legitimate governmental function; and that the provision authorizing the distribution of the serum to farmers and swine growers only was a reasonable classification.—*Fisher* v. *Board of Regents of University of Nebraska,* 189 N. W. 161.

Public Funds — County Funds for City Purposes. — Action was brought to require the county commissioners of a county in Nebraska to furnish rooms in the courthouse for the use of the municipal courts of the county-seat of the county, pursuant to the provisions of a state statute. The court held, that although the legislature could not divert funds raised by one district for the sole use and benefit of another district, as that would be an exaction of money for the benefit of others than those taxed, this requirement did not do this, but was simply an apportionment of funds for the general public benefit of all taxpayers in the county, the city taxpayers as well as those in the balance of the county having contributed to the funds from which the courthouse was built.—***State ex rel. City of Omaha et al.* v. *Board of Com'rs of Douglas County et al.,* 189 N. W. 639.**

Domicile. — In construing the revenue statutes of North Carolina the court held that under a law providing for the listing of property on a certain date in the township of residence, a taxpayer was required to list property in the township where he actually resided on such date, though prior thereto he had determined to terminate his domicile therein and to transfer it to another place, and subsequently moved to such other place, since both an intention or purpose and the consummation of such purpose were necessary to effect a change in domicile.—*Town of Roanoke Rapids* v. *Patterson,* 113 S. E. 603.

Budgetary Procedure a Prerequisite to Lawful Tax.—Action was brought to obtain a decree to the effect that the tax levy of a village in Idaho was null and void, on account of the failure of the village trustees to make and publish an estimate of expenses and to pass an annual appropriation bill, as required by law. The court held that the previous preparation and publication of an estimate of the probable amount of money necessary to be raised for all purposes and the passage of an appropriation bill, constituted condi-

tions precedent to the levy by the board of village trustees. The court also held that a taxpayer was not required to tender a portion of a tax levy as a condition of invoking the power of a court of equity, when the tax levy was totally void.—*Graves* v. *Berry et al.,* 207 Pac. 718.

MONEY ON HAND IMPUTED BY STATUTE.—A law in Kansas provided that where bonds of the United States had been purchased by any person during the year prior to March 1, a sum should be listed for taxation as money on hand on March 1, computed by dividing the value of such bonds by twelve, and multiplying the quotient by the number of months of the year remaining, after deducting the time the bonds were owned.

A taxpayer paid a tax assessed pursuant to the above mentioned statute, and brought suit to recover the same. The court held that the act violated the state constitutional principles of equality and uniformity: denied purchasers of government bonds the equal protection of the laws, guaranteed by the federal constitution and violated the federal statute exempting bonds of the federal government from state taxation, and the uniformity clause of the state constitution.—*Lantz* v. *Hanna, Treasurer, et al.,* 207 Pac. 767.

INDIAN LANDS. — The federal government allotted a number of parcels of land in Oklahoma to certain Indians. The allotments were completed in 1908 but the deeds were not finally approved and executed until May, 1909. The allotees having died before the allotments were completed the land descended to their heirs. The land was taxed as of March 1, 1909. The federal government sought to enjoin the sale of the land for unpaid taxes. The court granted the injunction, holding that as title had not passed to the allotees or their heirs until the final approval and execution of the deeds, which took place after the assessment date, the lands were then held in trust by the United States and were not taxable. — *United States* v. *McCurdy,* 280 Fed. 103.

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A. E. HOLCOMB, Treasurer and Subscription Manager, 195 Broadway, New York City.
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The relation of income and property taxes is a problem which appears to be simple enough, at first glance, but it gives rise to some troublesome complications if pursued further. On the surface the solution appears to be that suggested by the Committee on a Model System of State and Local Taxation, which was the taxation of all tangible property where located, the exemption of intangibles from property taxation, and the taxation of the entire net income of the individual, from whatever source derived. The part of the income tax that falls on the income from intangibles is evidently to be regarded as a substitute for any kind of property tax on these representative forms of wealth. The taxation of all property and of all incomes would be regarded by some, at least, as double taxation, but if the distribution of these taxes be made universal by efficient administration, it is felt that no injustice would be done. The Association's Committee on a Model System saw in this arrangement a more convenient means of providing to some extent for heavier taxation of the so-called "funded" incomes than by any classification of incomes as funded and unfunded.

This solution has the merit of being simple and practical, and it has been adopted by New York, Wisconsin, and some other states. It is not to be regarded as a generally satisfactory disposition of the problem of property and income taxation, for a number of states have steadily refused to adopt constitutional provisions which would permit the introduction of such a system. Two unsettled points may be noted, which are, after all, but different aspects of the same issue.

The first of these matters in dispute is the treatment of intangibles as compared with other forms of property. The argument for their exemption as property is too familiar to need restatement, and from the theoretical standpoint we may grant its validity. Intangibles, for the most part, *are* representative property, and they *do* have value *only* by reason of the underlying tangible property which they represent. It is double taxation for the same jurisdiction to tax both the tangible property and the paper evidences or intangible rights of ownership.

If the United States were a single taxing jurisdiction, the soundness of this

argument would be appreciated and the problem of property taxation would clear up, except with respect to those intangibles which represent tangible assets located outside our national boundary. The problem would clear up, also, if intangibles always represented physical wealth located within the same taxing jurisdiction as that in which the owner of the intangible property resided. The complication arises because of the many co-ordinate taxing jurisdictions, coupled with the interstate character of so much of our business enterprise. It is not always easy, indeed it is sometimes impossible, to persuade the land owners in one state to agree to the complete exemption of intangibles from the property tax on the ground that the physical property which these represent is taxed in another state. According to the view which demands complete exemption of intangibles, the farmers of Ohio and Illinois, for example, *ought* to be satisfied when told that the property underlying the stocks and bonds held by Ohio and Illinois investors is taxed by Pennsylvania, New York, Indiana and other states, and they ought to be willing to exempt such intangibles from the property tax, but they are not. Even when the assessment of such forms of property is grossly inadequate and unequal, they resist change, mainly on the ground that the taxes levied on the property in another state should not relieve one class of property owners residing in Ohio or Illinois more than another from contributing to the support of their own government.

The other unsettled question is the proper relation of the tax on property to the tax on the income therefrom. This question, apparently so simple, presents a very embarrassing alternative when pressed to the limit. The advocate of the general property tax who is persuaded to spare intangibles from property taxation when the income from such forms of wealth is taxed, cannot see the reason for combining a property and an income tax in the case of other forms of property. The farmer will agree to substitute an income tax for the property tax on bonds, but he wants the same privilege in the case of lands. The attempt to substitute the income tax for the property tax is fatal to the former as was shown in *Missouri*. Yet the amendments proposed this fall in Ohio and Colorado contained language looking to this kind of substitution, while the new revenue sections of the Illinois constitution proposed this alternative for intangibles.

In all of this there is doubtless great confusion and lack of clear understanding of the true nature of the income tax and of various other matters. The whole issue turns about the question of the proper position of intangibles in a scheme of property taxation. When the income tax first entered upon its new lease of life it was thought of as a substitute for the taxation of intangibles as property. The Report on a Model System of State and Local Taxation emphasized the personal character of the income tax, which was to be dissociated entirely from the property tax. Neither tax was to be a substitute for the other. The exemption of intangibles was recommended in view of the universal failure to secure an adequate listing of such property under the property tax.

At this point, however, it seems that the Report requires some modification. It is necessary to hold fast to the concept of the income tax as a personal tax, the weight of which shall be determined by taking into view the entire net income, regardless of source; but it seems necessary, too, to retain the property tax as a fairly well-rounded whole, rather than to trim it down simply to a tax on real estate and a few forms of tangible personalty. The suggestion which we have to make as a means of adjusting these divergent views without sacrifice of fundamental principles is the combination of thoroughgoing classification of property including intangibles, and the personal income tax. Hitherto these two systems have been thought of as mutually exclusive — they were discussed as alternative substitutes for the situation which had developed in the attempt to tax intangibles under the general property tax. The basic principle of the Model Plan appears to lead, quite as logically, to the combination of the two taxes, once we admit the complications which arise from the interstate character of wealth and property holdings in the United States. In other words, our suggestion is that some sort of combination of the low, flat rate taxes on intangibles and the personal income tax be worked out. Space forbids further elaboration of the idea in this

issue, so we must say "continued in our next". The proposal is submitted with due diffidence, and with some realization, perhaps, of the difficulties to be encountered in its practical application. The subject is of great importance, for there seems to be little prospect of further progress in tax reform in some states until some middle ground of compromise can be reached.

A CORRECTION

Professor Plehn calls our attention to an error in foot-note number 16 in the paper on the "Sales Tax" in the November issue of the *Bulletin*. The reference should be to Professor F. R. Fairchild's quotation of T. S. Adams' paper in the *Bulletin* for June, 1921. This citation is correctly made in foot-note number 8, page 43 of Mr. Leander's paper.

THE SEVERANCE TAX

Mr. George Vaughan sends the following communication in explanation of certain points which he made in his paper at Minneapolis on the taxation of natural resources:

"Some members of our Association seem to be laboring under the impression that the chief proposal of my address at the Minneapolis conference, on the 'Taxation of Natural Resources,' was the advocacy of a special sort of a tax on that character of property. This erroneous impression seemed to have been gained from my previous address in Oklahoma on 'The Severance Tax and Kindred Exactions,' which was published in the *Arkansas Gazette* on March 26, 1922. For example, one correspondent took issue with my stand in that address favoring the severance tax *as a compromise*. His language was as follows:

"'I note your suggestion that the tax may be justified as additional to the property tax, because of the gross negligence in administering the latter, and I rather question the advisability of this suggestion. Is it not better to contend for good administration of *all* tax laws and justify the tax *per se,* or else advocate it as a *lieu tax.*'

"And again:

"'I should think it desirable to carefully define the basis of the tax and show how it may be justified as an additional tax, without admitting the inadequacy of the property tax; and I note that you call attention to the failure to provide adequately for an appraisal of mines—which indicates that you would have such an appraisal. Would you then think a severance tax justifiable? I hardly like to advocate the tax as a "compromise" to make up for lax administration of other taxes.'

"That portion of the Oklahoma paper to which this criticism relates consists of four paragraphs under the sub-head 'The Severance Tax a Compromise'. The gist of the stand there taken was expressed in the first paragraph:

"'As a matter of convenience and administration, therefore, and to offset or compensate in a degree for the enormous public loss through lack of an accurate appraisal, the severance tax may intervene as a satisfactory compromise to all concerned.' (*Southwestern Political Science Quarterly,* March, 1922, pp. 299-300.)

"This portion of the text was retained in the substantial reprint of the article in the *Bulletin* for May, 1922, although certain other portions of the original draft, dealing with the application of the severance tax to forests, were expurgated. (*Bulletin* of N. T. A., May, 1922, pp. 249-250.)

"At the time of the delivery of the Oklahoma paper and in the course of its preparation, the writer had not thoroughly studied the possibilities of the scientific appraisal for public purposes of natural resources. Later research in this field, however, convinced me of its entire feasibility and of the enormous gain awaiting a forward step in that direction. Because of this unexpected 'find', the Minneapolis paper, the scope of which was broad enough to cover all existing methods of taxing natural resources, was deemed a fit medium for placing emphasis upon the theory and practice of the scientific appraisal of mineral deposits under the general property tax system.

"The investigation of actual experience in this domain was surprisingly fruitful. Accordingly, I became thoroughly convinced that the most sensible advance available in the effort to secure from owners of hidden mineral resources a just contribution in taxes is not *via* the severance tax with its limitations due to irregularity of

output and market value. But it will be realized by applying recognized analytical appraisal methods to such properties in their capital rather than their income aspects.

"The net result of the broader study was crystallized into certain conclusions differing somewhat from those of the Oklahoma paper, but preserving the major principles of that utterance while modifying but not discarding the minor conclusions.

"Preference is given in the concluding summary to the property tax, with emphasis upon accurate appraisement, relegating the severance tax to oil and gas, diamond mines and like properties presenting unusual difficulties in valuation, while as to the other classes of natural resources the severance tax, if imposed at all, should not be a lieu tax but supplemental only and nominal in amount.

"It is regrettable that there should be encountered any confusion in reconciling the later more comprehensive discussion with the preliminary findings of the first inquiry which were at the time specifically announced to be only 'tentative'."

PERSONAL

Mr. Charles R. Howe, chairman of the Arizona State Tax Commission, was re-elected to this body for a six-year term, by a very large majority.

OHIO TAX ASSOCIATION

The Ohio Tax Association held its annual conference on December 7th and 8th at Columbus.

The Association adopted the following resolutions urging the legislature to: (1) order a re-appraisement of real estate at quadrennial intervals; (2) repeal the present tax limitation laws and enact new legislation permitting higher rates in municipalities than in rural districts; (3) provide for a county budget commission composed of the county auditor and two citizens elected for four-year terms on non-partisan ballots, such commission to be limited in its authority to adjust tax rates only by the maximum rates fixed by law; (4) be more generous in appropriations to the State Tax Commission in order that it might have more machinery for the purpose of carrying out the duties imposed upon it by law; (5) provide for an election of county auditors on non-partisan ballots.

These resolutions do not reflect accurately the whole range of topics discussed by the Association. A bill has been prepared for the purpose of establishing new and higher tax limits, and a preliminary draft of this bill was presented by its author, Representative Robert A. Taft of Cincinnati. There was general complaint of the serious difficulty which most Ohio cities continue to experience in attempting to operate under the rigid limitations of the Smith One Percent Law.

A considerable proportion of the members in attendance continue to endorse the curious notion that the state tax levy is the root and source of the present tax problem in Ohio, and there was strong sentiment for the abolition of all state tax levies except that for the soldiers' bonus. This means, of course, the "home rule" idea in taxation. But nothing can possibly be gained by evading or avoiding the state's responsibility for the effective supervision of local assessment and taxation. This must go on whether there be a state tax or not.

Mr. John A. Zangerle of Cleveland, auditor of Cuyahoga County, was elected president of the Association, and Mr. S. E. Forney, chairman of the Ohio Tax Commission, was made secretary and treasurer.

THE INCREASE OF TAXES IN CLEVELAND

Mr. John A. Zangerle, auditor of Cuyahoga County, has recently issued a pamphlet on the finances of Cleveland and its suburbs. In one sense it was issued as a campaign document; but it contains some very interesting statistics relative to assessed valuations, tax rates, tax levies, the distribution of these levies, and various other matters. For example, the assessed valuation of property in Cleveland has advanced from an estimated total of $714,800,000 in 1911 to $1,704,000.000 in 1921—an increase of almost $1,000,000,000; but the tax rate per $100 has risen in the same time from $1.36 to $2.46. The per capita tax levy for the city of Cleveland has advanced during this same decade from $16.64 to $52.70. The pamphlet does not show the amount of money that has been borrowed by the city of Cleveland since

1911 for the purpose of meeting current expenses that could not be met within the tax rate limitations imposed. The efficiency of the assessment system in Cuyahoga County is reflected in the very low cost of $60 per $1,000,000 of property assessed.

FINANCIAL EMBARRASSMENT OF OHIO CITIES

A number of the larger municipalities of Ohio are facing the prospect of large deficits during the fiscal year 1923, as the result of the defeat of special tax levies in the recent election. Many of these cities are already exceeding the limitations imposed by the Smith One Percent Law and its various amendments; and the special levies referred to had been authorized as emergency relief measures by the last two legislatures. The defeat of these levies indicates the risk that was being taken in proposing to establish drastic constitutional tax rate limitations which could be exceeded only by vote of the taxing district.

A summary of the prospects for 1923 in certain of the larger cities has recently been made for the Associated Press. We learn from the newspaper résumé of this report that Lima anticipates a deficit of $50,000, after turning off the street lights, abolishing the street cleaning department, eliminating traffic supervision, reducing three fire stations to a one-man basis, and making various other drastic reductions. Certain lights are burning in the business and exclusive residence districts through the generosity of business men; and the ordinance whereby street lighting costs will be assessed against property owners will probably be put into effect on the first of January.

Cincinnati faces a deficit of $79,000 for 1923, after eliminating $900,000 of expenses from the budget, mainly by reducing appropriations for public works, street cleaning, police and fire departments.

Youngstown has the pleasant prospect of a deficit of $774,000, while Toledo is looking forward to operating expenses which will aggregate $650,000 in excess of revenues after the necessary sinking fund requirements have been met. Toledo's sinking fund for 1923 will amount to $2,000,000 — almost half of the city revenue.

Various other cities report a parallel situation. There is no prospect of relief in sight, and the situation revealed by this survey indicates the rate at which Ohio is sliding back into the dark ages on taxation. The State Grange has recently announced its opposition to a re-appraisal of real estate and from various counties reports are being made of a decline in the assessed valuation of personal property. Meanwhile, forward-looking members of the legislature are planning to wipe out the Smith Law and enact a new measure containing substantially higher rate limitations. The old vicious circle is in operation—competitive undervaluation, advance in tax rates, progressive escape of personal property. We cannot help wondering how long it will be before somebody in Ohio is willing to admit that he has had enough.

THE VOTE ON THE NEW ILLINOIS CONSTITUTION

Professor M. H. Hunter sends the following comments on the special election in **Illinois:**

The proposed revenue changes for the state of Illinois went down to defeat with the rest of the constitution through the vote of the people on December 12. The majority opposed to adoption was about 700,000, which was about a 5 to 1 defeat.

It is impossible to say just what influence the revenue proposals had in bringing this result. The constitution was voted upon as a whole, and there were several points of contention. It was generally expected that Chicago would be unfavorable to it because of the provision that limited its representation in the General Assembly. It was hoped, however, by those desiring ratification that this would be overridden by the down-state vote.

The revenue sections provoked a large amount of discussion. Those favoring ratification stressed three features. One was that the proposed constitution provided for no new taxes, but simply made it possible for the General Assembly to inaugurate them, since the new provisions were merely permissive and not mandatory. The second feature urged in its favor was the opportunity it would give to the General Assembly to reach intangible property through section 142—" In lieu of any tax on intangible property or any kind or class thereof, by valuation, the General Assembly may provide a uniform and substantial tax on the income derived therefrom." The third

point urged in its favor was that the provisions were better than those found in the old constitution, and further changes could be secured by amendments.

The most of the opposition centered around section 143 — "A general income tax may be imposed upon all net incomes. If such income tax is graduated and progressive, the highest rate shall not exceed three times the lowest rate." The maximum exemptions that the General Assembly could allow were $1,000 for the head of a family, plus $200 for each dependent under sixteen years of age, and $500 for all others. An income tax under such limitations was interpreted as placing a very disproportionate burden upon the poorer classes. It was frequently pointed out that the provision for taxing intangibles was no more than a "joker" inserted to try to carry through the strict limitations on the income tax. Instead of advocating the adoption of something we do not like, merely because it is better than something we have, and then attempt to change it through amendment, the opposition pointed out the difficulty of securing amendments and the likelihood of getting what we really want much quicker through a new constitutional convention.

Illinois, then, will continue to center her revenue system around the general property tax, notoriously administered under elected assessors, in spite of the use of oaths and the provision for fines and imprisonment upon both assessors and assessed. But the vote of December 12 indicates that the people will have nothing to do with changes which obviously favor large incomes to the disadvantage of the poorer classes.

TAXATION IN WISCONSIN

The Wisconsin Tax Commission has recently issued Bulletin No. 16 in its series dealing with financial and taxation matters. This Bulletin presents the aggregate amount of taxes of all kinds levied in the state for the fiscal year ending June 30th, 1922.

The general summary of these taxes indicating the sources and the purposes for which they were raised, is presented in the tables which follow:

TABLE I

Table Showing All Taxes from Every Source Raised for All Purposes During the Fiscal Year Ending June 30, 1922

Source of Taxes*	Total	State	County	Local	School
General Property	$97,142,844	$7,739,454	$20,415,572	$36,423,305	$32,564,513
Inheritance	1,282,687	1,186,485	96,202		
Income	7,068,820	706,882	1,413,764	4,948,174	
Teachers' Retirement Surtax †	1,504,391	1,389,743	....	114,648	
Railway (Steam)	7,295,084	6,930,312	....	‡ 364,772	
Street Railway	1,551,803	232,770	310,361	1,008,672	
Sleeping Car	33,702	33,702			
Freight Line	28,229	28,229			
Express	10,579	10,579			
Telegraph	154,010	154,010			
Telephone	575,485	232,279	....	343,206	
Conservation and Regulation Companies	7,898	1,184	1,580	5,134	
Insurance	1,125,136	1,125,136			
Occupational	141,070	14,107	28,216	98,749	
Totals	$117,921,738	19,784,872	$22,265,693	$306,660	$32,564,513
Per cent to Total	100.0%	16.8%	18.9%	36.7%	27.6%
State Aids* Returned to Counties and School Districts	....	6,428,773	2,389,491	. . . . .	4,039,282
Totals	$117,921,738	13,356,099	$24,655,184	$43,306,660	$36,603,795
Per cent to Total	100.0%	11.3%	20.9%	36.7%	31.1%

* Motor License Fees not included.

† Soldiers' Educational and Bonus Surtaxes ($1,507,011) not included.

‡ Terminal Tax returned to districts.

TABLE II

DETAILS OF STATE AIDS RETURNED

Educational Aids:		
Common Schools	$3,127,164.00	
Rural Schools	166,043.00	
Graded Schools	138,600.00	
High Schools.	302,821.00	
Teachers' County Institutes	9,000.00	
County Training Schools	184,654.00	
County Schools of Agriculture and Domestic Economy	36,000.00	
Blind and Deaf	107,174.00	
Classes for Exceptional Children.	4,800.00	
Vocational Education	192,679.00	
County Supervising Teachers	204,046.00	
		$4,472,981.00
County System of Prospective State Highways		785,000.00
Care of Insane in County Asylums.		697,694.00
Couuty Agricultural Societies		250,320.00
County Tuberculosis Sanitoria		192,778.00
Mothers' Pensions		30,000.00
		$6,428,773.00

"Table I shows the aggregate amount of taxes (except soldiers' bonus surtaxes) levied in the state for all purposes for said year amounting to $117,921,738, and the amount of such taxes levied for state, county, local and school purposes respectively, together with the percentage which the amount levied for the state and each class of its political subdivisions bears to the total. It will be observed that of this aggregate amount $19,784,872 or 16.8% was for state purposes, $22,265,693 or 18.9% for county purposes, $43,306,660 or 36.7% for local purposes, and $32,564,513 or 27.6% for school purposes. It should be borne in mind that these figures represent the amounts levied in each case and not the amounts expended.

The $19,784,872 levied by the state includes $6,428,733 which the state was required to and did return to local districts in the form of state aid. Table II shows the different purposes for which state aid is given and the amounts returned for each purpose. As this amount was not used for state purposes, but was returned to and used by the local districts, it should be deducted from the $19,784,872 aggregate tax revenue levied for the state and charged to the municipalities which received and expended the same.

If we credit the state with this amount, which it merely collected, and charge the same to the local districts which actually received and expended it, we have a net balance of $13,356,099 or 11.3% of the total as the aggregate amount of all taxes raised and used for state purposes for the year ending June 30, 1922, as shown at the foot of Table I. As nearly as the same can be expressed in terms of taxes, this is the amount which the people of the state contributed for the support of state government, including the cost of maintaining the state university, the nine normal schools, Stout Institute, and all penal, charitable, reformatory and administrative departments of state government for that year. On this basis, the amount available for county purposes was $24,655,184 or 20.9% of the total, the amount for town, city and village purposes $43,306,660 or 36.7%, and for school purposes $36,603,795 or 31.1%.

Automobile license fees amounting to $4,088,570, soldiers' educational bonus tax amounting to $1,388,522, and certain corrections of the soldiers' cash bonus tax, amounting to $135,830, are all omitted from these tables for the reason that the so-called automobile tax is imposed under the police power of the state for the purpose of regulation and is not a tax at all in the strict sense of the term. The soldiers' bonus taxes were levied for a special and temporary purpose, having no relation to the ordinary expenses of government and are omitted for that reason. If included, they would impair comparison of tax levies with prior and subsequent years and also with the tax levies of other states which either paid no bonus at all or in very dif-

ferent amounts. Inclusion of these items would increase the total tax levy by about $5,500,000 but would not materially affect the distribution between the state and local subdivisions, as most of the automobile license fees are returned to the local districts and the soldiers' bonus taxes are paid to ex-service men in all parts of the state. As the teachers' retirement fund surtax is permanent and is levied for a regular governmental purpose, it is included in the tables.

During the present state campaign it was repeatedly stated from the platform and repeated in the press that it cost the taxpayers of the state from $33,000,000 to $55,000,000 for the support of state government for the last fiscal year. It will be observed that these statements differ widely from the $13,356,099 shown as the cost of state government in Table I. No details were given to support these statements and the most conservative of them is flagrantly erroneous. The amount of revenue raised by taxation for the support of state government has never exceeded the sum of $15,000,000 in any one year, with the single exception of 1920 when the soldiers' cash bonus was paid, and that was not a normal governmental expense. It is true that the state derives some revenue from other sources than taxation, such as income from trust funds, special licenses and departmental earnings which is used to meet state expenses, but the receipts from these sources are relatively small compared with the amount derived from taxes, and it would be interesting to learn where the balance of these imaginary expenditures come from."

Another table presents the aggregate amount of general property and income taxes paid to the state by each of the counties and the amount returned to each county in the form of state aid. The aggregate taxes received by the state from the general property tax and the income tax during the fiscal year 1922 was $8,446,336, and the aggregate amount of aid returned by the state to the several counties was $6,428,773. This leaves a balance of $2,017,563 as the net amount contributed to the state by the general taxpayers for the fiscal year in question. The remainder of the state revenues was derived from the taxes imposed on various classes of corporations and from the state's share of the inheritance and other taxes shown in Table I.

The report continues: "The tables contained in this bulletin, whether considered separately or together, conclusively show that the net cost of state government to the ordinary taxpayers of the state is less than 2% of the total amount of taxes paid by them, and in consequence cannot possibly explain their high taxes. About 68% of all classes of taxes are expended for town, city, village and school purposes and nearly 21% for the counties, leaving only 11.3% of the aggregate amount which is used for state purposes, and most of this amount is derived from public service companies and inheritance and insurance taxes. Of course, these percentages vary slightly from year to year, but they confirm the statements made in former bulletins that the increasing burden of taxation cannot properly or honestly be charged to the state government, and that if relief is desired, it must be secured by greater economy in local levies and expenditures.

With minor exceptions, local communities control both the levy and expenditure of taxes for county, town, city, village and school purposes, and each locality has a member in the legislature to guard against extravagance there. It is true that certain classes of school and highay aids are conditioned upon the local community raising a corresponding amount in order to secure the aid. In the case of schools, the local levies generally exceed the aid received, so that this qualification does not affect the cost of education to them. The policy of prescribing minimum wages for teachers and a few other classes of public servants lends some force to the claim that local expenditures are increased by the requirements of the state. But it is impossible to determine what weight to give this argument because it is not and cannot be known how much more local districts are compelled to pay competent teachers under this law than they would have to pay to secure the same service in the absence of it. Incompetent teachers are expensive at any price.

The law providing for state aid to highways is not compulsory and the counties are at liberty to accept or reject its terms as they please. The only penalty for failure to accept is a loss of highway aid for that particular year. But whether the policy of state aid and minimum wage is

wise or unwise is for the legislature to determine, and is not a problem of tax administration or of municipal accounting. After making due allowance for the increased cost of local government which may result from these laws, the fact still remains that the great weight of the tax burden borne by the general taxpayers of the state, probably 95% of it, is occasioned by local expenditures wholly within their own control, and the only way it can be effectively curbed or reduced is by greater care and economy in the management of their local affairs.

THE TAXATION OF INCOMES IN OKLAHOMA

J. FREEMAN PYLE

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I. A Brief History of Income Tax Legislation in Oklahoma

Oklahoma passed its first income tax May 26, 1908, shortly after its admission as a state of the Union. The law required the assessor, at the time of making the assessment of real and personal property, to demand of each person a statement of his income in so far as it exceeded $3,500. The blank to be filled out contained this question, "Was your gross income from salaries, fees, trade, profession and property upon which a gross receipt or excise tax has not been paid, any and all of them for the year ending June 30, last preceding, in excess of $3,500?" If the answer was in the affirmative the person filled out a blank certifying the amount of the taxable income, the assessor also signed the blank, then forwarded it to the state auditor, who in turn certified the amount of the tax due to the proper county clerk. The tax was then extended on the rolls in the same manner as other property. The township assessors were required to furnish the state auditor a list of all persons subject to the tax and who had made the declaration together with the names of other persons who, in their opinions, might be liable for income tax. The state auditor was given power to subpœna witnesses and to take other steps to ascertain whether such persons ought to make returns.[1]

The rates were levied on gross incomes of persons except in the case of incomes derived from property upon which a gross receipt or excise tax had been paid. The following table[2] illustrates the gradation of rates employed:

Amount of Taxable Income	Rate
From $3,500 up to $5,000	½ of 1 per cent
In excess of $5,000 and up to $10,000	¾ of 1 per cent
In excess of $10,000 and up to $20,000	1 1/5 per cent
In excess of $20,000 and up to $50,000	1½ per cent
In excess of $50,000 and up to $100,000	2 per cent
In excess of $100,000	3½ per cent

The revenue derived from this tax was added to the common school fund. It was unlawful to print or publish in any manner any income tax return or any part thereof, and penalties for false swearing or failure on the part of the assessor to perform his duty were provided. However, in spite of these precautions the law was a complete failure, as far as producing revenue was concerned. The following figures indicate that the law was well-nigh universally ignored.[3]

[1] Kennan, K. K., *Income Taxation*, p. 225.

[2] Revised Statutes of Oklahoma, 1910, Vol. II, Art. XVII, sec. 7532, p. 2049.

[3] Comstock, Alzada, *American Economic Review*, X, 2, p. 263.

Year	The Revenue Produced by the Income Tax Law of 1908
1909	$2,816
1910	4,913
1911	4,671
1912	4,834

In 1912 the state auditor recommended that the law be either thoroughly revised or repealed. In 1915 the legislature made a drastic revision of the whole law, virtually enacting a new income tax law.

II. Outstanding Features of the Present Oklahoma Income Tax Law

The 1915 law was similar in many respects to the federal act. However, in view of the fact that the law is the result of many compromises, it does not exactly follow any particular mode. It provides for a graduated income tax upon the net income of individuals only; it does not apply to the incomes of corporations as do some of the other state income tax laws. Private corporations and banks are assessed upon the net value of their moneyed capital,[4] surplus and undivided profits, as the same is entered on the first day of March, and the assessed valuation of any real estate located in the state owned by the corporations and listed separately.

The properties, equipment, etc., of oil and gas companies are subject to the general property tax. In addition to the ad valorem tax on property and assets, common carriers, public utilities, oil and gas companies pay a gross revenue tax, the rate varying according to the nature of the service performed. Those corporations which do not pay a production income or gross receipt tax pay a license fee varying with the size of their capital. The rate is higher on foreign than on the domestic corporations. The present personal income tax is an addition to the other taxes, as no credit is allowed for other taxes which have been paid. The income of municipal bonds of the state of Oklahoma is taxable under the income tax law.[5]

The law applies both to residents and to non-residents who receive a taxable income from Oklahoma sources. The income tax blank sent out by the auditor indicates ten possible sources for gross income, viz., (a) salaries and wages; (b) professions and vocations; (c) business, trade, commerce, or sales or dealings in property, " whether real or personal "; (d) rents; (e) interest on notes, mortgages, bonds, bank deposits or evidence of debt of any kind whatsoever; (f) dividends on stock of corporations, joint stock companies and associations; (g) fiduciaries (income received by guardians, trustees, executors, administrators, agents, receivers, conservators or other persons acting in a fiduciary capacity); (h) partnership gains and profits whether distributed or not; (i) royalties from mines, oil wells, patents, franchises or other legalized privileges; (j) all other sources not enumerated.

Section One of the act states that each and every person in the state shall be liable to " an annual tax upon the entire net income of such person arising or accruing from all sources during the preceding calendar year, and a like tax shall be levied, assessed, collected and paid annually upon the entire net income from all property owned and all other business, trade or profession carried on in this state by persons residing elsewhere." In order to determine the net income, it is necessary to subtract certain allowable deductions from the gross income. Under " General Deductions " the income tax blank provides for seven classes of deductions,[6] viz.: (a) The amount of all necessary expenses actually paid within the calendar year for which the return is made, in carrying on any individual business. This item must not include personal, living, or family expenses. Amounts paid for permanent improvements or betterment of property are not proper expense deductions. Donations are not proper deductions

[4] " Moneyed capital " includes money actually invested in the business whether represented by certificates of stock.

[5] Bunn's *Annotated Supplement of the Revised Laws of Oklahoma,* sec. 7302, p. 1023.

[6] Oklahoma State Income Tax Blank, S. E. & I. Form 1247. (1922)

according to the income tax blank. (b) All interest paid within the year on personal indebtedness. (c) All state, county, school, and municipal taxes paid within the year—not including those assessed against local benefits and federal income tax. (d) Losses actually sustained during the year incurred in trade, or arising from fires or storms and not compensated by insurance or otherwise. Payments for oil and mining leases are termed investments and not proper deductions if the lease is still held. In connection with this item the taxpayer is required to show three facts, viz., (1) of what the loss constituted, (2) when it was actually sustained, and (3) how it was determined to be a loss. The knowledge of these facts gives the auditor a check and no doubt aids him in determining the accuracy of the report. (e) Debts due to the taxpayer actually ascertained to be worthless and charged off at the end of the year. In connection with this question he is required to state four facts, viz., (1) when the debts were created; (2) of what the debt consisted; (3) when the debt became due; (4) how they were actually determined to be worthless. These data are to be presented on a separate sheet. (f) An amount representing a reasonable allowance for exhaustion, wear and tear of property arising out of its use or employment in business. The auditor's instructions specifically prohibit the deducting of wear and tear, gasoline and upkeep on pleasure cars. The taxpayer is required to give two facts in connection with this item, viz.: (1) What the property was on which depreciation was taken; if buildings, the date of construction, material used, and the value as of January 1st of the calendar year for which the report is made, must be given. (2) What per cent of depreciation is claimed. The 1921 amendment provided that depletion on mines and oil wells should be computed under the rules and regulations in force and from time to time adopted by the Department of Internal Revenue of the Government of the United States. In no case, however, may a greater depletion amount be allowed the taxpayer by the State of Oklahoma than is allowed by the United States Government against federal income taxes upon identical property.

From the net income computed as described above, the taxpayer is allowed certain other deductions, viz.:

(a) A specific exemption of $3,000 to an individual.

(b) However, if the individual is living with his or her spouse, an additional exemption of $1,000 is allowed. In other words, the two are allowed a total exemption of $4,000.

(c) In addition to the above exemptions, the taxpayer is entitled to an exemption of $300 for each child under the age of 18 years.

(d) For each child and every person for whose support the taxpayer is legally liable, an additional exemption of $500 is allowed while the child or person is engaged in acquiring an education, while only $200 additional is allowed in all other cases.[7]

Having computed the total net taxable income by subtracting the sum of the general deductions and the specific exemptions from the gross income, the present law provides that the net income tax shall be computed in the following manner, viz.:

(a) On the first $10,000 in excess of the exemptions and deductions, 7½ mills.

(b) On the next $15,000 in excess of the exemptions and deductions, 15 mills.

(c) On all amounts in addition to (a) and (b), 20 mills on the dollar.

The tax is computed by adding together the amounts payable under each of a, b and c.[8] These rates are much lower than the rates in the original law of 1915. The following table gives a summary statement of the development of the present graduated scale, i. e., the scales of the laws of 1908, 1915 and 1917.

These various schedules of graduated scales indicate that the legislature of Oklahoma has been experimenting in order to find the most satisfactory combination of rates and amounts subject to the various rates. The 1915 law provided an initial rate which was regarded as too high, while the number of classes was greater than circumstances warranted. As a result, in 1917 the legislature reduced the number of classes from five to three and at the same time reduced the initial rate from ten

[7] The taxpayer is to state on a separate sheet, when he returns his income blank, (a) the number of dependents, (b) the age of each, (c) the number engaged solely in acquiring an education, and (d) the legal liability of the taxpayer to support each of the dependents.

[8] Session Laws of 1915, Chap. 164, p. 286 f.

1908 *			1915		1917	
Amounts in excess of	and less than	Rates (mills)	Amounts	Rates (mills)	Amounts	Rates (mills)
$3,500	$5,000 . . .	5	First $10,000	10	First $10,000	7½
5,000	10,000 . . .	7½	Next 15,000	20	Next 15,000	15
10,000	20,000 . . .	12	Next 25,000	30	All amounts in excess.	20
20,000	50,000 . . .	15	Next 50,000	40		
50,000	100,000 . . .	20	All amounts in excess.	50		
100,000 and above		33⅓				

* The 1908 rates were on the gross income while the 1915 and 1917 rates apply to net incomes. In any case the tax was computed by adding together the amounts payable under each of the classes.

mills to seven and a half mills and cut the maximum rate from fifty mills to twenty mills. As a result of these changes the effectiveness of the tax was greatly reduced. While the tax retained its graduated features the greater burden fell upon the incomes between $4,000 and $30,000, as all incomes in excess of the first $25,000 of taxable incomes paid a flat rate of 2 per cent. As compared to other state income tax laws, the Oklahoma statute provides for a much higher exemption, i. e., $4,000 for a married couple, $300 additional for each dependent and $500 additional if the dependents are engaged in getting an education. The legislature was probably influenced in setting its exemptions high by the presence of many people in the state with relatively high incomes derived from the oil industry, while the relatively low incomes of the masses were not taxed. The high cost of living in the state no doubt also influenced the legislature in making the exemptions high.

The law makes no specific provision for the exemption of gifts or of proceeds of life insurance policies, as is done in some of the state income tax laws. Evidently these incomes must be counted as part of the gross income, as Article XVII, sec. 7537e, subsection f, states, ". . . and all other income of any kind derived from any source whatever, except such as is exempt from taxation hereunder by some law of the United States or of this state,[9] shall be included in the term 'income'".

Non-residents receive the same treatment as residents as far as their property in Oklahoma is concerned. The Supreme Court of the United States decided that a state may impose an income tax on the income accruing to non-residents from their property or business carried on in the state. Therefore the Oklahoma law is not invalid for want of jurisdiction.[10] It was also decided that the Oklahoma law does not deny non-residents the privileges and immunities to which they are entitled and the equal protection of the law; in fact, it permits residents to deduct from their gross income losses incurred within or without the state, while non-residents may deduct only those incurred within the state. Thus non-residents are taxed only on their income from sources within the state while residents are taxed on the income from all sources.

The law makes no provision for credit for taxes paid by a resident on income received from without the state which may have already paid a tax. He must pay on his entire net income. Thus a person living in Oklahoma who receives part of his income from property in Missouri would be forced to pay two state income taxes upon the same income, provided of course that it was large enough to be classed as taxable income. On the other hand, if he lived in Missouri he would be allowed— under the Missouri income tax law — an offset for a certain amount paid in Oklahoma. When the law was first passed there was objection that it was unconstitutional because it provided for taxation of incomes from oil property which property was already paying a gross production tax. The United States Supreme Court [11] held that even if the income tax constitutes double taxation, as applied to producers of

[9] Bunn's *Annotated Supplement*, p. 1028.

[10] In *Shaffer* v. *Carter*, 252 U. S. 37.

[11] *Ibid.*

oil and natural gas, paying a gross production tax, it does not violate the Constitution so long as such taxation is not based on arbitrary distinctions. In the case of gains of partnerships the taxpayer must count the gains as part of his income whether they are distributed or not. The amendment of 1921 allows a deduction not to exceed 15 per cent on the taxpayer's net income for charitable donations.

Administration of the income tax law is in the hands of the state auditor, who provides the blanks which are filled by the taxpayer and returned to the auditor's office. If any person liable under the law fails or refuses to make a return, or if he makes a false return, the state auditor may give him ten days' notice to appear before him in his office with books of account showing the condition of his business during the year. If the individual refuses to do this, the auditor may apply to the District Court of Oklahoma County or any judge thereof for an order requiring compliance. If it is found that the person has been guilty of attempted fraud or evasion, there is added to his tax as a penalty, $5 per day for each and every day the person has refused to comply — after March 15. Each individual's report must be filed on or before March 15, in the auditor's office. The 1915 law set March 1 as the date, however, in order to bring the state date as near as possible to the date for making the federal income tax return, the change was made. The tax becomes due June 15, and is delinquent if not paid on or before July 1.

The effect of the change in the law in 1915 is clearly shown in the change in the amount of revenue received. The revenue for 1910, 1911 and 1912 was $4,915, $4,671 and $4,834, respectively, while the revenue collected in 1915 and 1916 amounted to $250,000 and $400,000, respectively. However, the amount collected in 1916 was only 1.5 per cent of the entire amount of tax revenue collected in Oklahoma, yet it was greater than the total revenue produced by the income tax during the preceding seven-year period.[12] If the receipts from the state income tax are compared with the receipts by the federal government from personal incomes in Oklahoma, the latter tax appears much more productive, i. e., the federal government collected $4,347,797 in 1916, $5,682,493 in 1917, $7,649,280 in 1918, and $12,207,129 in 1919. That is, the federal government received approximately ten times as much revenue from personal incomes in Oklahoma in 1916 as the state. In 1919, 3.03 per cent of the population made returns to the federal government, reporting an average net income per return of $3,937.96 with an average amount of tax paid per return of $198.49. In 1918 there were 7,009 returns on incomes from $3,000 to $4,000; 4,688 returns on incomes from $4,000 to $5,000; 1,721 returns on incomes from $5,000 to $6,000; and 1,010 returns on incomes from $6,000 to $7,000. The number reporting returns was much greater in 1918 than in 1916; for instance, there were only 384 returns in the $3,000 to $4,000 class in 1916. In view of the great increase in returns and in the amount of the tax in the case of the federal income tax, it might be expected that the state income returns and collections would show the same great increase. Whether this is true or not cannot be stated, as the reports of the state auditor are not available. Repeated attempts have been made by the writer to secure these data. But the legislature of Oklahoma failed to make an appropriation for the publication of the auditor's report in sufficient quantities for distribution, and private correspondence likewise brought no information. The general impression, however, seems to be that the state income tax is not producing nearly as much revenue as it should. The high exemptions and the low rates in themselves would cause a relatively low yield. The administration of the tax by the auditor's office, without special district officers to aid in applying the law in the various localities, leads to evasion and consequently to a low yield and unsatisfactory results in general.

To summarize, the Oklahoma income tax law provides for a graduated tax, with comparatively low rates and high exemptions, on the net personal incomes of both residents and non-residents. The administration of the tax is entrusted to the state auditor. The 1908 income tax law proved a failure as a revenue-producer, while the present law has brought in much more revenue. But owing to inadequate machinery for administration and to the high exemptions and low rates, this law has not produced the amount of revenue which its proponents expected.

[12] Comstock, Alzada, *American Economic Review*, X, 2, p. 262.

DECISIONS AND RULINGS

EDITED BY A. E. HOLCOMB

Mortgage Recording Fee—Effect of Non-Payment. — Under the Minnesota statutes, an executory contract for the sale of land, under which the vendee is entitled to or does take possession, is deemed a mortgage of the land for the unpaid balance of the purchase price, which is subject to a mortgage recording tax, and it is provided that no such document may be recorded or received in evidence until the tax has been paid. The court held that where the vendors under an executory contract had failed to pay the tax, the statutory notice to the vendee terminating his rights under the contract, had no legal effect.—*Engel* v. *Mahlen,* 189 N. W. 422.

Inheritance, State — "Capital Invested" by Non-Resident—Good-Will. —Under the New York statutes the court held that the interest of a non-resident decedent in a partnership in the state constituted "capital invested" in the state and was taxable; that credits representing his share of the profits not withdrawn by him and not used in the business were intangible property and were not taxable. It also held that "good-will" did not constitute capital invested in the business, and that the decedent's interest in such good-will was not taxable.—*In re Hanson's Estate,* 195 N. Y. Supp. 255.

Inheritance, State — Expenses of Appraising a State Charge.—In a Utah case the question was whether under the inheritance tax laws the per diem and expenses of appraisers, appointed by a district court to appraise the estates of decedents subject to inheritance taxes, were to be borne by the estates or by the state. The court held that the legislature had expressly provided that the charges for actual services and for such necessary expenses as were incurred in the performance of their duties by appraisers should be paid out of the state treasury as other officers were paid and that an estate was not chargeable with such payments.—*Parks et al.* v. *Sutton, State Treasurer,* 208 Pac. 511.

Inheritance, State — Federal Tax Payable Out of Residuary Estate.— The Massachusetts court held that the federal tax, being an estate tax, must be paid out of the residue of the estate, when no provision was made by will for its payment otherwise.—*Taylor* v. *Jones,* 136 N. E. 382.

Inheritance, State—Gift to Son on Conditions—Remainders. — A gift by a father to his son, of a life estate in shares of stock, with power of appointment over the remainder, on condition that the son would abandon the practice of medicine and enter the father's business, and providing that in case the son predeceased the father, the fund should revert to the father, was held not a gift or transfer in contemplation of death, but a valid agreement, which became effective immediately, so that neither the life estate nor the remainder was subject to tax in New York. —*In re Cole's Estate,* 195 N. Y. Supp. 541.

Inheritance, State—Deed of Trust. —Where property is transferred by deed of trust, and the donor reserves the right to alter, modify, or revoke the instrument, it is testamentary in character and the law in force at the death of the donor governs the taxation of the transfer. No constitutional right is violated by such a tax which may be assessed on a remainder, over which a power is given.—*In re Schmidlapp's Estate,* 196 N. Y. Supp. 108.

Inheritance, State—Nature of Tax in Hawaii — Educational Purposes— Devise Subject to Discretion of Trustees.—The inheritance tax act of Hawaii was held to provide for a tax upon the act of passing property by will and not a tax upon the property itself.

When a testator devised property to trustees, with authority to devote the income to educational purposes, in their discretion, after fulfilment of other requirements of the will, or to devote it to any public enterprise, the transfer was not exempt, as one for "educational purposes".

Where testator devised property to trustees, to pay an annuity to his wife and after his death to his son, if the estate permitted it, having regard to continuing its commercial character, the tax was held payable by the trustees and not by the son. —*Castle* v. *Castle,* 281 Fed. 609.

INHERITANCE, STATE — GIFT TO TAKE EFFECT AT DEATH.—A non-resident transferred shares of stock to a trustee, reserving to himself the income for life, and directing payment of the fund, after his death, to those whom he should designate in his will, or in default of such designation, to his descendants. The transfer to the descendants was held testamentary in character and not effective until the death of the testator and subject to the tax under the New York law.—*In re Hanna's Estate,* 195 N. Y. Supp. 749.

INHERITANCE, STATE—PENALTY TAX IN NEW YORK—COMPUTATION OF TAX.—The New York court, in determining the amount of a decedent's estate subject to the additional inheritance tax on investments (since repealed) excluded bonds secured by mortgages on real estate entirely within and recorded in New York state, and also a proportion of the value of investments, represented by the ratio of the bequests to a charitable corporation to the net value of the entire estate. The remaining proportion of the value of the investments was reduced by a proportionate part of the debts, funeral expenses and expenses of administration, and the balance was held subject to the tax in question.—*In re West's Estate,* 193 N. Y. S. 317.

INHERITANCE, STATE — APPRAISAL OF MORTGAGES. — A New York decedent's estate included a number of real estate mortgages, of which 75% were overdue. The rate of interest on all but one was less than 6%, and in some cases the value of the real estate had depreciated below the face value of the mortgage. The appraiser depreciated the value of the inadequately secured mortgages, to the value of the real estate which secured them, took the others at their face value, and deducted 10% from the total. The court held that such method of appraisal was improper; that six per cent mortgages secured by real estate, of greater value, were worth face value; that overdue mortgages, regardless of rate of interest, when secured by real estate of greater value, were worth face value; that mortgages secured by real estate of lesser value were worth no more than the value of the security; that mortgages paid up since decedent's death were worth what was received for their satisfaction, less a discount of the difference between the rate of interest and 6% for the period from the death of decedent to the date of satisfaction; and that mortgages not due at date of decedent's death should be appraised at face value, less a discount of the difference between the rate of interest in the mortgage and 6%, for the period between decedent's death and the date of the maturity of the mortgage, except where the mortgage was in excess of the value of the security, in which event the value of the security should govern.—*In re Kingsland Estate,* 193 N. Y. Supp. 638.

INHERITANCE, STATE — DEDUCTION OF FEDERAL TAX.—The executors of a Michigan decedent claimed that under the laws of that state, the estate was entitled to a deduction for the amount of the estate tax paid to the federal government, before the computation of the state tax. The court held that such taxes were not deducible. It held, after citing numerous decisions in other states, the majority of which allowed the deduction, that it would follow the minority, as it was convinced that they stated the true rule. It held also that under the statute in question the tax was levied upon the clear market value of the property transferred, as of the time of the death, which did not contemplate deduction of the federal tax.

One of the sections of the statute, which was passed in 1903, required executors to file an itemized statement of the property, and of the debts and expenses of administration. The court held that the loose language contained in the section could not be held to justify the deduction of the federal tax imposed under a statute enacted many years later.—*In re Fish's Estate,* 189 N. W. 177.

INHERITANCE, STATE — DEDUCTION OF OTHER STATE INHERITANCE TAXES.—The Massachusetts court held that inheritance

taxes paid to other states should be deducted before computing the tax upon the estate of a resident decedent; that a succession tax law should not be so interpreted as to exact an excise on the succession of that which in fact could not pass to any beneficiary, because seized by the state, on its way from the dead to the living, unless the words of the statute left no alternative.—*Hollis* v. *Jackson, Treasurer,* 136 N. E. 162.

Inheritance, State—Intangibles of Non-Resident Decedent — Method of Appraising Real Estate. — The New York court held that the value of real estate located in that state, conveyed by the executors of the estate of a non-resident decedent, pursuant to a contract to sell made by the decedent prior to his death, was not subject to the inheritance tax in that state, as the amounts due on the contract must be regarded as intangible property of the non-resident, which was not subject to the tax.

The court also held that an appraisal of certain real estate subject to the tax was arbitrary and improper, because the appraiser, after ascertaining the fair market value of the property unencumbered by any lease, deducted a value representing a capitalization of the difference between the actual net rent and an estimated six per cent net return for the unexpired term of the lease. It held that the statute required the property to be appraised at its fair market value, which should be determined from a consideration of the income received under the lease, the location, the value of other property in the neighborhood, the nature of the improvements on the land, the sale of neighboring real estate, and other similar factors. — *In re Russell's Estate,* 194 N. Y. Supp. 837.

Inheritance, State — Life Tenant's Testamentary Exercise of Power over Property Outside the State.—A California resident under the will of her father, a Massachusett resident, was given the power to dispose, by will, of property located in Massachusetts held by trustees, residents of Massachusetts, the income of which was paid to her during her life. She made such a testamentary disposition before her death and California sought to impose a tax on the transfer. The court held the tax invalid, on the theory that the property had not acquired a situs in the state, since it was no part of the estate of the daughter and no necessary incident of the transfer depended for its efficacy upon the laws of California.—*In re Bowditch's Estate,* 208 Pac. 282.

Inheritance, State — Power of Appointment—Retroactive Tax. — In an Iowa case the statute imposed a tax on estates passing by will or by statutes of inheritance, etc., and did not expressly mention transfer by power of appointment. The court held that a transfer by the exercise of a power of appointment, created by a will of one dying before enactment of the statute, was not taxable; that the tax was upon the devolution or the right of succession to property, and not a tax upon the property itself; that under a will giving a person a power of appointment, the appointee was regarded as taking under the will, and not through or from the donee of the power, and that as the transfer here was to be regarded as made at a date prior to the enactment of the statute, the tax could not be applied.—*In re Higgins' Estate,* 189 N. W. 752.

Special Assessments — State Control.—In a Wisconsin case the court held that a law of that state providing for metropolitan sewerage districts, did not, because only the property in the district was to be taxed, violate the provision of the state constitution that taxation should be uniform and upon such property as the legislature should prescribe, since improvements conducive to public health might be made at the expense of the property directly benefited thereby, and the legislature, acting through the commission, had itself directly established the district boundaries and directed what money should be raised by taxation, leaving to the taxing officers merely the ministerial duty of determining the necessary amounts and providing therefor on the tax roll. — *Thielen et al.* v. *Metropolitan Sewerage Commission et al.,* 189 N. W. 484.

Special Assessments — Review by Court Permissible.—Under the Missouri statutes sewer improvements are authorized by a proceeding in the county court, which court has jurisdiction to establish sewer

districts, condemn property and to assess taxes for the improvements. All property owners are made parties to such a proceeding but notice must be served only on those property owners whose property is being condemned. A property owner resisted a tax, alleging numerous grounds of illegality. The county set up the defense that the property owner was estopped from questioning the assessment, as the entire matter was adjudicated in the original proceeding in the county court. The court held that the property owner was not estopped from claiming illegality, because the county court, when exercising its jurisdiction in the original proceeding was acting in a legislative capacity and its action did not constitute a judgment at law but merely the foundation of an assessment, which, if invalid, might subsequently be questioned. — *Cornet* v. *St. Louis County,* 240 S. W. 107.

Special Improvement Districts without Power to Impose Privilege Taxes. —An Arkansas road improvement district was authorized by statute to impose a privilege tax upon the use of motor vehicles by residents of the district. The court held the statute invalid, on the ground that the general power of taxation could only be delegated to a subordinate political agency of the state, and not to a governmental agency, created for the purpose of constructing and maintaining local improvements.

The court held also that if the tax were a property tax, it also would be invalid, because personal property could not be taxed to pay the cost of local improvements. — *Whaley* v. *Northern Road Improvement District of Arkansas County,* 240 S. W. 1.

Special Assessments. — The Arizona court held that a statute authorizing the organization of irrigation districts was similar to those enacted and upheld in other states; that under such statutes, legislative powers were not delegated to ministerial bodies, nor levies on real estate beyond the legal limits authorized; that personal property might be excluded from taxation for local improvements and that the constitutional provision requiring taxation to be equal and uniform had no application to assessments levied for local improvements. — *In re Auxiliary Eastern Canal Irr. Dist.,* 207 Pac. 614.

Income, Federal — Dividends Tax Free—Act of 1917. — A question which has been widely discussed is as to the interpretation of section 31 B of the 1916 federal revenue act, as amended by the act of 1917, providing that dividends distributed in 1917 should be "deemed" made from the "most recently accumulated undivided profits or surplus" and should be taxed at the rates in force for the years of such accumulation.

The district court passed upon the question in a case where the taxpayer received dividends late in 1917, which the corporation, by its vote, allocated to various years in certain percentages, although its divisible profits for the year 1917 were much more than sufficient to pay the dividend so allocated to that year.

The court first considered the effect of the word "deemed" and held that it meant "adjudged", and hence that the corporation was not at liberty to itself determine the allocations; that to do so would frustrate the evident purpose of Congress, to subject the rich profits of the war period to the heavy taxes laid upon such profits, and would be out of harmony with the language used.

The farther and more important question was as to the meaning of the words "most recently accumulated undivided profits or surplus"; whether they meant the current earnings of the calendar or fiscal year in which the distribution was made or those accumulated prior to such year. The books of the company in question were audited annually, at the close of the calendar year and the plaintiff, by reference to the books on accountancy, urged that the words could not refer to current earnings, because this would be contrary to the practice of accounting and bookkeeping, under which actual profits could not be known, without an audit and appraisal; that the directors must act in the light of such audit and Congress must have framed its action accordingly.

The court considered the question from the practical view that Congress acted in the light of actual practices, knowing that corporations, in declaring dividends, did so by varying methods and for differing periods, often from recent earnings and

often when no current earnings were available, resorting in such cases to surplus of previous years, whatever might be the form of the bookkeeping entry. It held that the statute was prepared for the general public and that ordinary interpretation of the words used must be taken, rather than any technical limitation which might be placed upon them by experts, and thus the construction made by the Treasury Department in art. 107, Regulations 33 Revised, was held to be in entire harmony with its views. Under this regulation, current earnings must first be applied to cover the dividend, and if insufficient, previous earnings may be applied, the rates attaching being those in force in the respective years. The dividends received by plaintiff were held to be conclusively presumed to have been paid from profits of the year 1917, to the extent thereof, up to the date of the declaration of dividend, regardless of the language of the resolution or the intent of the company and the assessment having been made upon that basis, it was held properly levied. — *Harder* v. *Irwin,* U. S. D. C., N. D. of N. Y., Nov. 29, 1922.

The court in another district decided a case involving the same question determined in the case above noted. In this case a mining company distributed dividends in 1917 from what it designated as a " depreciation reserve " account and the stockholder claimed in his return that such dividends were not taxable, being a return of capital, and further that such dividends could under no circumstances be taxable, because the earnings distributed in the years 1913-1917 exceeded the total earnings of those years. The court held these claims untenable because, for the purposes of this case, a depletion dividend was no different from any other dividend and because if, as was the case, the dividend paid in 1913, 1914 and 1915 exceeded the earnings for those years, the excess was paid out of surplus accumulated prior to 1913, leaving the surplus earnings over dividends paid in the year 1916 more than sufficient to pay the depletion dividend paid in 1917.

The court held the congressional intent to be clear, that distributions to shareholders were to be regarded as made from current earnings and the most recently accumulated surplus; that Congress did not intend to " lay down a narrow rule to be whittled away by technical definitions of the terms surplus, undivided profits, dividends and distributions. Nor did it intend to recite a mere *prima facie* rule, which could be arbitrarily set aside by the form of bookkeeping entries. It is to be assumed that Congress desired that, so far as possible, the tax should be regulated by the substance of things and not their form, and that taxation should not fall more lightly on one man than upon another, because of ingenuity in bookkeeping methods."

Therefore, finding that the net earnings for 1917 were at the time of the distributions in question more than sufficient to meet them, the court held that they were taxable and were properly included as income of the shareholder for the year 1917.

The court indicated that had there been, concurrently with the so-called distribution for depletion reserve, a reduction in the capital stock, the case might have been different, as in such case the contention of the taxpayer would have been supported.

It is to be noted that in neither of these cases was it important to decide whether the date as of which the " most recently accumulated " earnings were to be computed was the date of declaration or of actual payment. This leaves still open the status, for instance, of a dividend declared in December, 1916 and paid in 1917. In the Harder case, the opinion used the word " declared " as the measuring date, while in this case the word " paid " is used. As a dividend becomes a liability at the date of its declaration, that date would appear to govern.—*Douglas et als.* v. *Edwards,* U. S. D. C., So. D. N. Y., Dec. 18, 1922.

FEDERAL TAXES — WHEN INJUNCTION TO RESTRAIN COLLECTION LIES. — The United States Supreme Court has farther clarified the law as to the effect of section 3224 Revised Statutes, which provides that " no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." In *Lipke* v. *Lederer,* decided June 5, 1922 (*Bul.* VIII, 28), the court passed upon the question, and in this case restates and explains in detail its opinion in that case, to the substantial benefit of the reviewer. The injunction sought in this case was to prevent the collector from proceeding to

collect certain taxes, assessments or penalties claimed to be imposed under the revenue law or the National Prohibition Act, the collector having taken possession of the store of the plaintiff, with the intention of enforcing the collection by sale.

The court, as above stated, reviewed its ruling in *Lipke* v. *Lederer,* which it held squarely in point, from which it seems evident that the prohibition contained in section 3224 does not apply to a suit to restrain the collection of an assessment, even though it be technically called a tax, which is imposed by summary process, without notice, not preceded by opportunity to contest its validity; that guarantees of due process of law are not to be forgotten and are not practically to be denied, as would be the case if the section were held to apply to all cases where the imposition in question may be termed a tax; that if the section were given such an interpretation. it would be unconstitutional. The action of the district court and the circuit court of appeals, dismissing the suit, was reversed and the cause remanded.—*Regal Drug Co.* v. *Wardell,* U. S. Sup. Ct., Dec. 11, 1922.

Income, Federal — Dividend Paid in Stock. — A corporation which had had large profits had used such profits to increase its plant and had not paid cash dividends nor was in position to pay them. Reaching a point where additional working capital was needed, it increased its capital stock, offered the same to its stockholders and as an inducement to them to subscribe for the new stock, each subscriber received in addition to the stock which he bought at par, 100 per cent of additional stock. Defendant and one other large stockholder agreed in advance to take at par any shares not subscribed for and he received the extra stock on such shares.

The circuit court of appeals affirmed the judgment below, holding that the transaction was nothing more than a means of refinancing the company; that the shareholders bound themselves to pay out money and in no sense received income, through the issuance to them of the extra shares. The court observed that the common understanding of "income" is something coming to a person and that it is not aptly described by a transaction where he is forced to pay, and does pay money to a company, which has not and has not been able to pay dividends and which is therefore not able to increase his income.—*United States* v. *Mellon,* 281 Fed. 645. See *Bul.* VII, 53.

Federal Taxes — Penalty for Failure to File Return—Wilful Neglect. —Section 3176 U. S. Revised Statutes, as amended by the Revenue Act of 1916, provided for the imposition of a penalty of fifty per cent of the amount of tax, for failure to file return within the time provided, except that where a return was voluntarily and without notice from the collector, filed after such time and it was shown that the failure to file was due to a reasonable cause and not to wilful neglect, the penalty was not to be applied.

Plaintiff, a manufacturer of bronze castings, was advised by counsel that it was not liable to munitions tax thereon and accordingly did not file return. The collector called attention to the delinquency and thereupon, upon the suggestion of the collector, it filed return and was assessed a tax and the penalty was added.

The case involved only the matter of the penalty, as liability to the tax had been determined in another proceeding.

The court held that the officers of the company were honestly mistaken as to the liability to pay the tax and there being no circumstances tending to cast doubt and suspicion upon their good faith, their ignorance of liability was sufficient to constitute a reasonable cause for failure to file the return within the time provided.

It was further claimed that the return must be filed "without notice" from the collector, to bring the case within the exception. The court held that no formal notice appeared to have been given, the collector having merely called upon the taxpayer, pursuant to section 3173 R. S., and having discussed the matter with the taxpayer. The judgment below was affirmed in favor of plaintiff for the penalty assessed, with interest. — *Dayton Bronze-Bearing Co.* v. *Gilligan,* 281 Fed. 709.

Income, Federal—Bequests to Executors in Lieu of Compensation. — The federal circuit court of appeals held, reversing the district court, that absolute bequests to executors named in a will which contained a clause that such bequests were

in lieu of all compensation, did not constitute income under the 1913 income tax act, which specifically excluded property acquired by bequest; that the legacies being payable independently of services, were donative and not compensatory.—*Merriam* v. *United States,* 282 Fed. 851. See *Bul.* VII, 126.

Federal Excise—Sale for Export.—Suit was brought in the federal district court to recover certain taxes assessed upon the sale of certain sporting goods, under section 600 of the revenue act of 1917. A foreign business firm placed an order for the goods with a commission house in the same city. The commission house purchased the goods from an American manufacturing firm, instructing it to mark the goods for shipment to the foreign country. The goods were delivered to an exporting carrier and were in due course delivered and payment was received from the foreign commission house which received a commission from the purchaser.

The basis of the suit was that the tax constituted a burden upon exports, contrary to article 1 of section 9 of the Federal Constitution; that while the tax was on the sale and not upon the manufacture, both the buying and selling and the transportation were parts or steps in export trade and that each step was free from tax, relying upon *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282 (*Bul.* VII, 160). The defendant replied that there was a distinction between a tax on the exportation of articles and a tax on a transaction in foreign or interstate commerce; that Congress might tax transactions in foreign commerce, so long as the act of exportation and its immediate incidents and instrumentalities were excepted therefrom.

The court upheld the defendant's contention and sustained his demurrer to the sufficiency of the complaint. It suggested that had plaintiff actually attended to the details of the shipment itself, taking out the ocean bill of lading and forwarding the same, with draft, to the purchaser, the transaction would not have been subject to tax, as the relationship between the successive steps would have been such as to preclude question as to the nature of the transaction as a foreign shipment. But here, the court observed, plaintiff's activities stopped upon its delivery of the goods to the steamship company; the merchandise might have been removed therefrom by the purchaser and resold within the United States; the sale was wholly made and consummated in the United States, quoting from Judge Hough's opinion in *Peck* v. *Lowe* (234 Fed. 126), "Protection [from taxation] begins with that act [of exportation] and must end with its completion," and holding that the most that could be said of plaintiff's activities was that it made the goods available for exportation by the purchaser. It sustained the tax as well within the reasoning employed by the Supreme Court in *Peck* v. *Lowe* (247 U. S. 165) and dismissed the complaint. — *A. G. Spalding & Bros.* v. *Edwards,* U. S. Dist. Ct., So. Dist. N. Y., Sept. 13, 1922.

Interstate Commerce — State and Federal Jurisdiction Fully Discussed. —In a case involving the question of the jurisdiction of the Missouri public utilities commission over the charges for natural gas brought into the state by a foreign corporation and sold to a state corporation, for sale to consumers by the latter company, the court entered into an elaborate discussion of the entire matter of the authority of the federal government and the states respectively, to regulate transactions involving in some degree interstate commerce. The opinion is valuable for reference, as it brings together numerous decisions which discuss the powers of the states and the limitations upon such powers. The general conclusion is that those subjects which are of such a nature that, if regulated at all, they should be regulated by a single authority, are beyond the power of the states to regulate, although Congress has not acted; that there can be no *regulation* by the states of interstate commerce under any circumstances. Referring to taxation, the court observes that "any taxation is a burden," and though "the states have the right to tax, still a direct tax on interstate commerce is not permitted at all, because it is a direct burden. It may not be a prohibitive or exclusive burden; but it is a burden, and to that extent it falls without the power of the state."

In this case it was held that while the gas was a commodity which should, in some way, be regulated, the power of direct

regulation of interstate commerce in it, "whether Congress has entered the field or not, cannot be and is not lodged in the state."—*State of Missouri* v. *Kansas Natural Gas Co.,* 282 Fed. 341.

PROPERTY IN TRANSIT—LOGS—INTERSTATE COMMERCE.—The United States Supreme Court reversed the Vermont court in a case involving the taxation of logs of pulp wood which were being floated from a point in that state to a mill in New Hampshire.

The logs in question were a part of a drive of logs, some of which went through later without stopping, but these logs were being held by a boom at a point in Vermont, awaiting the subsiding of water in the Connecticut river so that they might be safely continued. The state court held that the temporary holding of the logs at a Vermont point was for the benefit of the owner and in law postponed the initial step in the interstate transit, rendering them taxable. The Supreme Court held that the purpose of the temporary holding was to insure the safety of the transit which could not be held to affect its interstate character; that when goods were shipped in interstate traffic, interruptions required to promote the safe or convenient transit did not break the continuity of the trip; that interstate continuity was to be determined by a consideration of the various factors of the situation, chief among which were the intention of the owner, the agency by which the transit was effected, the actual continuity of the transportation and the occasion or purpose of the interruption during which the tax was sought to be levied. The state court had relied upon *Coe* v. *Errol,* 116 U. S. 517, which was fully examined and distinguished, as were other leading cases. — *Champlain Realty Co.* v. *Town of Battleboro,* U. S. Sup. Ct., Dec. 11, 1922. See *Bul.* VII, 65.

PRODUCTION TAX—ANTHRACITE COAL—CLASSIFICATION—INTERSTATE COMMERCE.—The decision of the Pennsylvania court sustaining the tax on anthracite coal, imposed by the act of 1921, noted in the last issue of the *Bulletin,* was speedily brought to the United States Supreme Court and promptly affirmed by that court.

The act provides that each ton of anthracite coal mined "washed or screened, or otherwise prepared for market" shall be "subject to a tax of 1½ per cent of the value thereof, when prepared for market," to be assessed at the time when the coal "is ready for shipment or market." Plaintiff, a stockholder of the defendant coal company brought suit to have the act declared unconstitutional and void and to enjoin the company from complying therewith, and the state officers from enforcing it.

The court announced its concern with the bill filed to be only with its allegation of repugnance to the Fourteenth Amendment, as denying the defendant company the equal protection of the laws, because the act taxed only anthracite owners and not those owning bituminous coal. The claim was that the classification was invalid because not putting both classes of owners in the same taxable class, as both products were *fuels.* The court expressed reluctance to enter upon a discussion of the principle of classification, observing that it was "too necessary and too familiar in the affairs of life" and contented itself with a reference to the well-known case of *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237; to *Watson* v. *State Comptroller,* 254 U. S. 122, and other recent cases, and citing *Dist. Col.* v. *Brooke,* 214 U. S. 138, 150, as containing important discussion of the subject.

Applying the principle to this case the court pointed out the fallacy of the plaintiff in erecting an argument based upon competition alone, in that both products were *fuels,* overlooking the other and equally important bases for classification, and by reference to the marked points of difference in characteristics and use, elaborately set out in the opinions of the state courts, readily concurred with the decision of the state supreme court sustaining the act.

A further and distinct attack upon the act was made on behalf of nine states—the six New England states and New York, New Jersey and Delaware — which appeared by their attorneys-general, by permission of the court, and assailed the act as illegal, as an attempt to regulate interstate commerce. This attempt by a group of states to invalidate a tax law of another state is, to say the least, unusual, and seems to betray a lack of respect for interstate comity. Its justification was

sought to be supported by reference to the practical monopoly enjoyed by Pennsylvania, in the product in question, which was urged as a reason for the attitude of the states mentioned, they asserting that the opportunity was afforded for one state to levy tribute upon others, in connection with their requirements for a "prime necessity". The court readily asserted its inability to discover any relevancy to the question of the asserted regulation of interstate commerce, in the suggestions of monopoly or the effect of the tax upon other states, observing that repugnance to the commerce clause depended upon the statute or action under it, not upon what was said about it or upon the motive which impelled its passage; or upon the degree of interference; that interference in *any* degree was illegal.

The court treated the contention of the states as being "that the products of a state that have, or are destined to have, a market in other states, are subjects of interstate commerce, though they have not moved from the place of their production or preparation," and observed that the consequences of such a contention repelled its acceptance; that it would involve the nationalization of all industries. It therefore refused to enter the field of speculation and argument thus opened and confined itself to a reference to the decided cases involving the question of the taxation of goods and products in transit. The case of *Coe* v. *Errol,* 116 U. S. 517, was held to be precisely in point and to have been decided against the contention made in this case. Other cases were cited, illustrating the settled doctrine that the point of time when goods cease to be governed exclusively by state law and begin to be protected by the national law of commercial regulation is the moment they commence their final movement for transportation from the state of origin to that of destination. Until then, they are a part of the general mass of property of the state and subject to its jurisdiction.

This tax, it should be understood, is an ad valorem tax, imposed under the power to classify, found in the Pennsylvania constitution and is not to be confused with production taxes levied as privilege or license taxes or with "severance" taxes.—*Heisler* v. *Thomas Colliery Co. et al.,* U. S. Sup. Ct., Nov. 27, 1922. See *Bul.* VII, 194.

Uniformity—Public Utility Assessments, as Compared with Other Property—Injunctive Relief. — In the city of Memphis, Tennessee, assessments of property, other than that of public utility corporations, for state and county taxes, are made by one set of officials and assessments for city taxes by another. Those corporations are assessed by the state board of equalization and certified to the county and city respectively.

Certain public utility corporations secured temporary restraining orders, alleging that their property was assessed at full value, while all other property in the city was assessed for city purposes at much less than full value and that, unless given relief by injunction, an illegal and unconstitutional burden would be imposed upon them.

Upon motion to set aside the orders, the city urged that injunction did not lie, as the complainants had a complete and adequate remedy at law, and further that the inequality alleged did not exist.

On the first contention it was admitted that there was no definite statutory remedy at law but the city claimed that the common law, as interpreted by the state courts, permitted the recovery of taxes paid under protest, that had been assessed under the circumstances alleged in the bills. The court held that the general rule was that such recovery could be had only where the taxes were illegal and void, not merely irregular; that nothing contrary was to be found in the decisions of the Tennessee courts and therefore equity jurisdiction existed.

Going to the merits of the contentions, the court found, upon a review of the affidavits submitted, that it was fairly shown that assessments for state and county purposes were in general at full value, being in many cases beyond such value, while those for city purposes were generally much less, averaging seventy-five per cent of full and actual value; that it was shown sufficiently for the purposes of temporary injunction, that the course pursued by the city board, while not intended perhaps to result in discrimination against the utilities, was nevertheless an undervaluation and that its policy must be deemed systematic and intentional, thus causing such discrimination as justified injunctive relief, the property of the utilities being found to be assessed by the state board at full value. The court, therefore, con-

tinued the injunction, modified so as to restrain the collection of a tax in excess of seventy-five per cent of the assessment made by the state board of the property of the utilities. — *Elgin* v. *Hessen, City Treasurer,* 282 Fed. 281.

Gross Earnings Tax on Public Utilities in California.—In California, public service companies are required to pay a tax on gross earnings, which is in lieu of all other state and local taxes on their operative property, and the non-operative property of such companies is subject to local taxation. These companies are required to make an annual report to a state board of their operative property by tax districts, and to furnish the assessors of the various tax districts with a copy of the report relating to their respective districts. If an assessor believes that non-operative property has been included as operative property by any company, he is required to give notice to the state board, which makes an investigation, holds a hearing, and determines whether or not such property is non-operative. A company filed a report of its operative property with the state board, and also a copy thereof with a local assessor. Subsequently the local assessor, claiming that part of such property was non-operative, without giving notice to the state board, made an assessment of such property, which was resisted by the company. The court held the assessment invalid, on the ground that the status of the property had, under the statutory procedure, been fixed as operative property, and could only be changed by the state board, acting upon the complaint of the tax assessor; and that as the assessor had failed to make such complaint, he was estopped from determining its status as non-operative and assessing it as such.—*Great Western Power Co.* v. *City of Oakland,* 209 Pac. 553.

Corporation Income, State—Use of Federal Form—Consolidated Return.—An interesting case arose in Connecticut, involving the interpretation of one of the new problems of income taxation. The law of that state provides for the use of the federal form and uses as the basis for the state tax the income upon which the company is required to pay a tax to the federal government, for the last preceding year.

A New Jersey corporation, doing business in Connecticut, filed a consolidated return for the federal tax for the year 1920, which included a number of affiliated corporations, two of which were also doing business in Connecticut. For this tax the net loss shown by the consolidated income for 1919, as compared with that for 1918, was taken as a deduction for 1920, as permitted by the act. This left no tax for the entire group, under the federal act.

The parent corporation filed the same return in Connecticut and claimed a similar result of no taxable income, with none of course to be apportioned to Connecticut.

The tax commissioner rejected this claim and required the filing of separate figures for the parent corporation and for the two affiliated corporations which were doing business in Connecticut. A consolidation of these three corporations showed net income, without considering the net loss provision, of $14,377,213.21 and with that provision, of $2,878,419.84. He refused to apply the net loss provision and computed the tax on the income apportioned to Connecticut, at $23,846.21.

The chief contention was thus whether the provision for the use of the income shown in the federal form meant, in the case of a consolidated return, that all the corporations included in that return should be taken, or only those doing business in Connecticut; whether the income upon which a federal *tax* was paid was to be taken or whether the income found in the federal return was to be taken.

The court held that the use of the federal form was merely for convenience, as a basis for the state tax; that the state was interested in the *income* shown and not in the question of whether any *tax* was paid to the federal government, notwithstanding the language in the state law that the tax should be computed upon the income "upon which income such company is required to pay a tax to the United States."

It further held that the provision in the federal act permitting the use of a consolidated return should not be construed as permitting so illogical a conclusion that when all the corporations in the group, taken together, showed no tax, this would justify the inclusion of members of the group not doing business in Connecticut whose deficits and net losses would deprive the state of a tax, when the members

of the group doing business in Connecticut, consolidated by themselves, would show taxable income.

The court therefore held that the action of the commissioner in considering only the members of the group doing business in Connecticut was correct, but held that he should have applied the net loss provision shown by those members. Making this adjustment, the court reduced the tax to $4,770.95 and directed the refunding of the balance assessed.—*Singer Mfg. Co.* v. *Gilpatric, Treasurer,* Ct. Sup. Ct., of Errors, Nov. 1922.

Foreign Corporation—Regulation—Tax on Insurance Premiums.—A statute of Arkansas imposes a liability, as a tax, of five per cent on the gross premiums paid for insurance to companies not authorized to do business in the state. A foreign corporation doing business in Arkansas was assessed under the act and the state supreme court justified the imposition, as an occupation tax. Upon writ of error the United States Supreme Court asserted its customary duty to test the constitutionality of a state tax by its effect, without regard to the name given it or of its construction by the state court. Upon such an inquiry, the court readily found the tax to be an attempt by a state to regulate a foreign corporation, authorized to do business therein, with respect to its activities outside the state.

The statute was found to have the same purpose, under another name, that the court had held to invalidate a similar act of Louisiana (*Allgeyer* v. *Louisiana,* 165 U. S. 578), in that it manifested a purpose to discourage insuring in companies that did not pay tribute to the state. The judgment of the state court was reversed.—*St. Louis Cotton Compress Co.* v. *Arkansas,* U. S. Sup. Ct., Dec. 4, 1922. See *Bul.* VI, 287.

Corporation Franchise — Foreign Corporation—Discrimination. — Under the Ohio statutes foreign corporations are required to pay an annual fee for the privilege of exercising their franchises in the state, based upon the proportion of their authorized capital stock represented by property owned and used, and business transacted in the state. A company, in seeking to enjoin the enforcement of such tax, alleged numerous constitutional grounds of illegality.

The court in sustaining the tax held that the state constitutional provision requiring all property to be taxed by a uniform rule according to its value, was not violated, since such provision did not limit the power of the state to tax rights, privileges, and franchises, which were not property within the meaning of such provision; that the statute, considering the language therein, and its reasonable and natural effect, did not impose an unconstitutional burden on interstate commerce; that due process of law was not denied, because no provision was made under the statutes for an appeal, since the right of appeal was not essential to due process of law; that the corporation was not deprived of the equal protection of the laws because the statute did not operate equally upon foreign, as compared with domestic corporations, since the differences between the two classes of corporations were such as justified a variation in the rate of taxation; that where the statute was a part of a comprehensive system of corporate taxation, operating on all corporations of a given class throughout the state, it would not be overthrown, because, in some instances, handships might be imposed upon corporations whose organizers improvidently provided for an excessive authorized capital stock, and that a corporation doing business in another state was not a citizen within the meaning of the constitutional provision, declaring that the citizens of each state should be entitled to the privileges and immunities of citizens in the several states.—*Airway Electric Appliance Corporation* v. *Archer,* 279 Fed. 878.

"Net Profits" — Federal Excess Profits Tax as Expense. — Where both parties to a contract of employment as general manager of a corporation, for a salary and a share of the net profits, knew that a reasonable amount of charging off for depreciation, doubtful accounts, and the like was customary in good bookkeeping, and no more was charged off than was reasonably to be expected, the amount to be charged off was properly deducted in computing the net profits. In computing net profits, excess profits taxes are to be deducted. — *Ransome Concrete Machinery Co.* v. *Moody,* 282 Fed. 29.

Banks — Other Moneyed Capital—New York Law Invalid.—The final stage in the state court, in the case involving the validity of the New York law taxing national banks, has been passed, the court of appeals having reversed the two lower courts and having held the taxes invalid.

The court squarely sustained the contention of the banks, that by taxing bank shares on the basis of one per cent of the book value of the capital stock and also taxing the dividends, under the personal income tax, while other "moneyed capital" was exempted from property tax and only taxed upon its income, there was a clear discrimination against bank shares.

The court immediately lower had construed the pertinent statutes as not including the dividends in the income tax and its decision had been reached by reason of such construction, as it held that other moneyed capital was in effect reached through the miscellaneous corporation taxes sufficiently to create equality with bank taxes. The court of appeals, however, rejected this construction, holding that the language of the statute "suggested no such punctilious regard for those whose income is derived from dividends on national bank shares"; that, on the contrary, it plainly included such dividends in gross income, under the income tax law, as to resident taxpayers. Thus finding that owners of bank shares were taxed twice—once under the one per cent property tax and again under the income tax—while individual owners of other moneyed capital were taxed but once—under the income tax, the court held that the discrimination was "too clear to escape recognition".

The status of non-resident owners of bank shares, who are not subject to income tax on their dividends, was not subject to the condemnation thus expressed, but this is unimportant as the court proceeded further, and considered the situation, for the purposes of its argument, upon the assumption that the dividends were not subject to income tax, as the court below had held, or that the income tax was invalid, and held that the one per cent tax was invalid for another reason. While admitting that the state might, so long as it proceeded with fairness and good faith, tax bank shares by one method and other moneyed capital by another, without exact uniformity or equality, it observed that the rule laid down by the Supreme Court required that bank shares might be taxed to the same extent only that other moneyed capital was taxed. With this rule to govern, it held itself powerless to say whether equality of taxation had been secured and injustice prevented where the comparison was between two methods "wholly unlike," viz: a tax by valuation, at a flat rate, as compared with a tax on income only, observing that "in no event would equality exist unless the income on competing capital were large beyond the dreams of avarice and the usual returns on investments." The orders below were reversed and the assessment vacated.

The court was not required to pass upon the question whether section 5219 of the U. S. Revised Statutes limited the states to the ad valorem tax on the shares, observing that the validity of the income tax on the dividends might be considered when it was assailed by a taxpayer in a proceeding in which it became necessary to decide that question.

As a result of this decision the bank tax situation in states having income taxes is made decidedly serious. In New York the only tax certainly lawful is the tax on the banks' real estate. The tax on the shares is wholly void and the validity of the income taxes, which have been regularly collected, to the extent that they have been based in part upon dividends on bank shares, is left in a state of uncertainty.—*People ex rel. Hanover Nat. Bk.* v. *Goldfogel et al.,* N. Y. Ct. of Appeals, Dec. 12, 1922. See *Bul.* VII, 193; VIII, 26.

Banks — Actual Value Not Book Value.—The provision of the Mississippi constitution, relative to the taxation of banks, provides that the shares shall be taxed "according to the value thereof (augmented by the accumulations, surplus, and unpaid dividends), exclusive of real estate, which shall be taxed as other real estate." The statute provides for a sworn statement showing the total amount of capital stock paid in and the undivided profits, surplus or accumulations, "not including its real estate," and that "the value of such shares, estimated at par and increased by the proportion of the par value of all the shares of stock to the said surplus fund or accumulations . . . shall

be the basis of the taxation of such shares to the bank . . . but if the shares of such bank or banking association are of less value than par, they shall be valued accordingly."

Several banks instituted suits to recover taxes paid upon values for the shares based upon the book showing of surplus and undivided profits, claiming that such values were in excess of the " fair market value ". The majority of the court seem to have been governed in their decision by the constitutional provision, which they held required assessment at true value, which could not be obtained merely from the book values of the various items of assets or surplus.

The only evidence introduced was that of the bank, showing a market value considerably less than the sum fixed by the assessing board, and in the absence of any other evidence this was held to control and the assessment was ordered reduced accordingly.

A division of opinion was shown as to the interpretation of the statute, the minority holding that the book figures should be shown, for the information of the assessor, not as controlling. The majority apparently held that the statute permits the bank to submit such figures as it believes to represent the actual value of the items of surplus. The difficulty of following this course, arising from the fact that surplus is always a book figure, determined not only by asset values, but as well by offsetting entries in the liabilities, does not appear to have been appreciated. — *Bank of Commerce* v. *Adams County,* 93 So. 442.

BANKS—UNDIVIDED PROFITS AND SURPLUS.—The Mississippi court held that the undivided profits, surplus, and accumulations which a bank should give in to the tax assessor, was the actual undivided profits, surplus, and accumulations, and not those carried on its books as such, in the event that those carried on its books were fictitious. — *Bank of Commerce* v. *Adams County,* 93 So. 442.

PENNSYLVANIA LOANS TAX. — Under the Pennsylvania statutes all scrip, bonds, certificates, and evidence of indebtedness issued, assumed, or on which interest shall be paid by domestic corporations to residents of the state are taxable for state purposes, and the corporation when paying the interest is required to deduct the tax. Such statutes also contain a provision making all loans of corporations secured by bonds or any other form of certificate of indebtedness held by residents of the state, except those taxable for state purposes, taxable for county purposes. The state sought to collect a tax from a company which had failed to deduct the state tax when paying interest on indebtedness held by a resident of the state which consisted of a mortgage of its real estate. The company claimed that such indebtedness was not subject to the state tax, because not within the definition. The court held that such indebtedness was subject to the state tax, and not the county tax; that a mortgage indebtedness was an evidence of indebtedness upon which interest was paid within the meaning of the statute imposing the state tax, and that the sole test was whether the company paid the interest because of an outstanding evidence of indebtedness of it or upon its property.— *Commonwealth* v. *Megargee,* 118 Atl. 541.

This court also held that promissory notes issued by a domestic corporation, and held by residents of the state, were subject to the state tax and not the county tax.— *Commonwealth* v. *Jacob Reed's Sons Inc.,* 118 Atl. 543.

EXCISE TAX — APPORTIONMENT FOR PART OF YEAR—RECEIVER'S LIABILITY.— A Massachusetts statute imposed an excise tax on street railroad companies, based on gross earnings, which was distributed between the municipalities served, in proportion to trackage, computed from returns required to be made as of September 30th each year, but which contained no provision for prorating the tax, where there had been a change of ownership during the tax year and no requirement for a return, except by the company operating on Sept. 30th. The court held that where the receiver for an insolvent company operated its lines during the first part of a tax year, when they were sold and thereafter operated by the purchaser, it would not undertake to apportion the tax and require the receiver to pay a part of it. — *Archibald McNeil & Sons Co.* v. *Bay State St. Ry. Co.,* 282 Fed. 338.

Corporation Franchise — No Par Value Stock.—Under the New York statutes a minimum annual franchise tax is imposed upon foreign corporations doing business in the state. Such tax is based upon the proportion of the total issued capital stock, taken at face value, which the gross assets employed within the state bear to the gross assets wherever employed and no par value stock is required to be taken at $100 per share. A company having stock of no par value, upon which only $8.55 was paid in on each share, was taxed under such statute, the stock being taken at $100 per share, and it resisted such tax. The court held the tax invalid, on the ground that the provision requiring no par value stock to be taken at $100 per share was arbitrary and resulted in unequal taxation, and was unconstitutional.

Foreign corporations are also required to pay an entrance fee, for the privilege of doing business in the state, based upon the proportion of the total issued capital stock employed in the state and upon subsequent increases in such proportion. No provision is made for the treatment of stock of no par value. In computing the license fee of such corporation, its no par value stock was taken at $100 per share. The court held that there was no authority in law for the assumption that no par value stock had a face value per share of $100; that the term "capital stock" as used in the statute meant actual capital, and that the fee upon the no par value stock should have been based upon the actual capital paid in. — *People ex rel. Terminal and Town Taxi Corporation* v. *Walsh,* 195 N. Y. Supp. 184.

Franchise—Inactive Corporation—Receiver Liable. — The Alabama court held that a domestic corporation, although in the hands of a receiver, was subject to the annual franchise tax, based upon paid-up capital stock; that as the tax was imposed upon the existence of the corporation, it could not escape it even by complete corporate inactivity, and that the penalty for failure to make the payment of the tax within time was against the receiver, as such, and collectible from the funds in his hands.—*State* v. *Bradley,* 93 So. 595.

Franchise — Associations Not Corporations.—The Michigan court held that partnership associations were not embraced within a statute prescribing the initial fee and annual franchise taxes to be paid by domestic and foreign corporations doing business in the state. The term "corporation" only was used and it was not defined in the statute. The state claimed that such term should be construed to include partnership associations because the term, as defined in another statute, providing for the organization of domestic corporations and for the admission of foreign corporations into the state, included partnership associations, and because the courts had held that certain provisions of the state constitution which related to all associations and joint stock companies, having any of the powers or privileges of corporations, not possessed by individuals or partnerships, included partnership associations. The court said that the statute in question related to corporations only; that it was clear and unambiguous, and that there was no occasion to refer to other enactments to discover the legislative intent.—*Whitney Realty Company, Limited,* v. *Deland,* 189 N. W. 1007.

Public Purpose—Tax to Supply Deficiency in Municipal Operation of a Public Utility.—The validity was questioned of a Massachusetts statute appointing trustees to take over and operate a railway constructed and owned by the city of Boston, which it had leased to a private company, the latter having gotten into financial difficulties. Under the act the trustees were required to make certain payments and to improve the property and any deficit in operation was to be assessed as a state tax upon the several cities and towns served, in proportion to the number of persons in each, using the service. The trustees found the property in bad repair and its rehabilitation led to a heavy deficit which was paid by the state and was about to be assessed as provided. The city of Boston thereupon sought to prevent the levy, contending that the act impaired its contract with the private company; that the tax was merely to aid a private corporation and was not for a public purpose and was a taking of its property without due process of law.

The court sustained the act, expressing full acquiescence in the opinion of the state court. It held that there was no hint

of impairment of the city's contract with the private company, but, on the contrary, the act was designed to secure the performance of that contract; that there was no taking of the city's property without due process, as the tax was laid on the city, not in its proprietary capacity, but merely as a collecting agency, the taxpayers being called upon to bear the burden; that this was a state purpose of a public nature, to wit: the furnishing of an important transportation service. The decree of the state court, sustaining a demurrer to the bill, was therefore affirmed. — *City of Boston* v. *Jackson, Treasurer,* U. S. Sup. Ct., Dec. 4, 1922. See *Bul.* VII, 25.

GASOLINE TAX—CONSTITUTIONALITY.—The federal court held that to determine whether a tax violates the United States Constitution, it is necessary to ascertain its actual effect, whatever name or description may be applied to it by the state court; that the Arkansas law requiring all sellers of gasoline, etc., for use in motor vehicles to collect a tax of one cent a gallon, in addition to the usual charge, and pay it over to the county treasurer, did not impose a tax on the purchaser, and did not deny due process of law, in violation of the Fourteenth Amendment, as making the seller liable for another's debts; that an excise tax on the privilege of making sales of named products, though measured by the quantities sold for a designated use, was within the state's power of taxation, when the commerce clause was not involved.—*Pierce Oil Corporation* v. *Hopkins et al.,* 282 Fed. 253.

MOTOR VEHICLE LICENSE—INTERSTATE COMMERCE—PROPERTY OR PRIVILEGE TAX —EXEMPTION FROM OTHER TAXATION.—The Oregon motor vehicle tax law provides that every owner, before he operates upon the highways, shall cause the vehicle to be registered. Graduated license fees are established, based upon weight, and motor busses are required to pay, in addition, a fee based upon their passenger capacity, allowing four dollars for each passenger. The act exempts non-resident owners but not foreign corporations doing business in Oregon. These taxes are in lieu of all other taxes and licenses.

The plaintiff, a Washington corporation, carrying passengers for hire, between Washington and Oregon points, filed suit to enjoin collection of the tax, alleging repugnance to the commerce clause of the federal Constitution, and to the Fourteenth Amendment; that it was not "doing business" in the state, within the meaning of the act, and that the tax was in part a property tax and invalid, for lack of uniformity.

The court held that the tax was passed in the exercise of the police power and that the state could exercise it with respect to interstate commerce, citing *Kane* v. *New Jersey,* 242 U. S. 160; that laws incidentally affecting interstate commerce will not, for that reason, be held invalid, Congress not having acted in the matter. Similarly the court held that the Fourteenth Amendment did not offer a refuge from the demands of a state, in the exercise of its police power, which was held to broadly comprehend regulations for the general welfare. The plaintiff was held to be doing business in Oregon by operating its vehicles on the highways of the state.

The tax was held to be a privilege tax and not a tax on property, the fee being not dependent upon the value of the car; as such it was held to be clearly constitutional and the provision for exemption from other taxes was held to be an exercise of the state's undoubted power. — *Camas Stage Co.* v. *Kozer,* 209 Pac. 95.

MOTOR VEHICLE LICENSE. — Under the Utah statutes automobile owners are required to annually register their automobiles, pay a fee and obtain a license to operate the same. When an owner sells or transfers his automobile he is required to return his registration card and license plate, and if he obtains another vehicle he is required to register it and again pay the full fee and obtain a license to operate the same. The statute was claimed to be discriminatory and to deny the equal protection of the laws. The court held that as the statute operated uniformly and affected all who might sell or exchange their automobiles, in the same manner, it was not discriminatory; that it could not hold a statute enacted under the police power of the state invalid, although harsh in its effect, unless it was clearly repugnant to some constitutional provision, and that relief from a harsh statute rested with the legislature and not with the courts.—*Bleon* v. *Emery,* 209 Pac. 627.

Exemptions—"Head of Family".—The federal district court held that where a tenant farmer, at the time of the filing of his bankruptcy petition, was living apart from and was not contributing to the support of his wife and child, he was not the "head of a family", within the Iowa Code, exempting to the head of a family certain stock and farm implements.—*In re Taylor,* 282 Fed. 315.

Exemption — Literary, Benevolent, Charitable, and Scientific Institution. — The Massachusetts court held in proceedings by an incorporated academy for abatement of taxes, that, while one of the purposes of the academy's incorporation was religious teaching, its paramount and dominant purpose was the education of boys and girls, to prepare them for business or calling, and make them valuable members of society, and that it was a literary, benevolent, charitable, and scientific institution and exempt from taxation; that Bible teaching was prominent in the course of study, or that the school was a denominational institution, did not prevent exemption, though part of the income of the school was used to impart religious instruction; that the sale of products of the farm conducted in connection with the school did not prevent exemption; that the fact that a cottage on the school grounds was occupied by the principal, from whose salary deduction was made on account thereof, did not defeat exemption.—*South Lancaster Academy* v. *Inhabitants of Town of Lancaster,* 136 N. E. 626.

Exemption — Incidental Use for Private Purposes — Sanitary District. —Public ground, the primary and substantial use of which is for public purposes, also used incidentally for minor or occasional private purposes, not interfering with the primary use, does not thereby lose its exemption from taxation under the Illinois law.

A terminal station used by a sanitary district, authorized to create and dispose of electrical energy for transforming electric voltage to a suitable voltage for delivery to consumers was held not used for public purposes, so as to be exempt, and not to be exempt because used incidentally for a record vault, the studio of the district's official photographer, or other incidental uses.—*Sanitary Dist. of Chicago* v. *Carr,* 136 N. E. 479.

Exemption — Unused Land. — The New Hampshire court held that a tract of land acquired by an educational institution as a site for new school buildings, except that part rented, was exempt from taxation. The exemption depended upon whether the site was occupied by the institution and it was shown that pending the construction of the school buildings a portion of the land was cultivated by the institution, and the remaining part was leased.—*St. Mary's School* v. *City of Concord,* 118 Atl. 608.

Exemption—Charitable Trust. — A trust was created in Illinois for the purpose of founding and maintaining a home for aged women. The trust property consisted of several parcels of real estate, one of which was used exclusively for the purposes of the home, and the others only in part for such purpose; of securities, the income of which was devoted to the charitable purposes in question, and of cash in banks used in meeting the expenses of the home. The real estate used in part for the purposes of the home, the securities and the cash, were assessed for taxation, and such assessment was resisted on the ground that such property was devoted to charitable purposes and exempt from taxation. The entire assessment was upheld. The court held that while the part of the real estate devoted to charitable purposes was exempt, it was not shown what part thereof was so used, therefore the entire parcel must be held subject to taxation; that the securities, even though the income therefrom might be devoted to charitable purposes, were not exempt from taxation, since the property itself must be used for charitable purposes before it might be exempted; that it was not shown what part of the cash was necessary to meet the ordinary running expenses.—*Smith* v. *Board of Review,* 136 N. E. 787.

Review and Relief — Injunction.—An Illinois taxpayer, on behalf of himself and other taxpayers, brought suit to restrain the collection of certain taxes. Defense was interposed that the taxpayer had an adequate remedy at law, as the statutes provided for the enforcement of taxes by

suit. The court held that even though the taxpayer had an adequate remedy at law it would exercise equity jurisdiction where it appeared that a multiplicity of suits would be avoided.

The court also held that where the tax collector informed the taxpayers that he would under no circumstances accept less than the full amount of the taxes, it was immaterial whether the tender by the taxpayers of the taxes admitted to be due was properly made.—*Hawkins* v. *Lake County,* 136 N. E. 487.

Review and Relief — Injunction.— The Alabama court refused to restrain the collection of a tax, claimed to be illegal, because the taxpayer had an adequate remedy at law, under which he could recover taxes illegally levied, even though such taxes were not paid under protest. The bill merely alleged that the taxes were illegal and void and the court held that unless there was an allegation of some ground for equitable interference other than illegality, irregularity or hardship, injunction proceedings would not lie.—*Allred* v. *Dunn,* 93 So. 390.

License — Power of Municipality.— An ordinance of an Illinois municipality requiring restaurant keepers to obtain licenses was held invalid as the power to license such business had not been expressly or impliedly granted by the legislature to the municipality. — *Potson* v. *City of Chicago,* 136 N. E. 594.

License—Tax Measured by Property Not Property Tax. — An occupation tax was imposed upon all businesses and occupations in which vehicles were used, by an ordinance of a Kansas municipality, the tax being based upon the number and character of the vehicles. The ordinance was attacked as conflicting with a general statute providing for the licensing of motor vehicles, under which all motor vehicles registered thereunder were exempted from municipal license fees; and as unconstitutional because discriminatory. The court upheld the tax on the ground that it was imposed upon the businesses and occupations and not upon the vehicles; that in determining the amount of such tax, property might be used as a measure which would not be a license fee upon the vahicle itself; that in framing its regulatory and revenue measures a municipality must be accorded a large discretion; and that its classification for occupational taxes would not be disturbed, in the absence of proof that the classification was discriminatory.—*Wichita Produce Co.* v. *City of Wichita,* 209 Pac. 667.

Inheritance, State — Parol Agreement for Testamentary Devise. — An Illinois resident purchased certain real estate and had the title placed in his wife's name. At the time of the purchase he entered into an oral agreement with her, whereby she agreed to make a will dividing the property equally between his children, all but one of whom were of a former wife. The wife made such a will, and after her death the question arose, in inheritance tax proceedings, whether the property passed to the children under the will of the wife, or under the parol agreement, the amount of the statutory exemption of the children being dependent upon the determination of this question. The state contended that the parol agreement was void under the statute of frauds, and that the property passed to the children under the will of the wife. The court held that the children took the property under the parol agreement, as beneficiaries of a trust created thereunder; that the statute of frauds could not be invoked to avoid a trust which had been carried into execution, and could not be interposed by strangers to the trust agreement.—*People* v. *Tombaugh,* 136 N. E. 453.

Inheritance, State—"Clear Market Value". — The Nebraska inheritance tax statutes are somewhat ambiguous as to the basis of valuation of property subject to the tax. The tax is imposed upon "clear market value"; the appraiser is required to appraise at "fair market value" and the county judge must determine the "then cash value". The court held that the terms "clear market value" and "then cash value" were synonymous, and meant cash market value at the time of the death of the deceased, as distinguished from the price which might be obtained for the property at a sale made partly upon credit. —*In re Woolsey's Estate,* 190 N. W. 215.

Special Assessments — Retroactive and Curative Acts. — A city in Florida brought suit to enforce the payment of a paving assessment. The original assessment had been held unenforceable as to the lot in question, by reason of an irregularity, and the city, pursuant to a resolution, issued a special assessment certificate against it, under which the suit arose.

The defenses were: (1) The city was not authorized to make reassessments where original assessments had failed; (2) The statute of limitations; (3) The reassessment should have been by ordinance, and not by resolution, and was therefore unauthorized; (4) The defendant was an innocent purchaser of the lot for value, without notice of any obligation resting upon it for the improvement of the street and the city was without authority to enforce the assessment against such property in defendant's hands.

The court held that the only limitations upon the legislative power of taxation were such as might be found in either the state or federal constitution; that there were no express provisions in the constitution of the state upon the subject of special assessments by municipalities for local public improvements, and no time limitation upon the exercise of the state's power of taxation; that neither the federal nor state constitution expressly forbade the enactment of retroactive laws, and such laws would not be held invalid because of their retroactive effect. The court held, further, that authority to reassess property, in cases where original special assessments were found unenforceable, by reason of error or irregularity, might be upheld upon the theory that the improvements tended to enhance the value of the abutting property, and as a consequence there rested upon the owner an economic and moral obligation to contribute his just proportion of the expense incurred in making such improvements, and the failure of an original assessment did not operate to discharge such obligation. The court also held that the transfer of property between the date of the original assessment, or the adjudication of its invalidity, and the date of reassessment, did not affect the obligation resting upon the purchaser to contribute to the public improvement by which the value of his property had been enhanced, and he could acquire no rights superior to those of the state to enforce that obligation; that special assessments might be levied upon an executed consideration, i. e., for a public work already done, and an assessment for benefits derived from improvements previously made did not constitute a deprivation of property without due process of law. The court further held that the enforcement of the payment was not a deprivation of property without due process of law, although no notice was given prior to the proceeding to enforce such assessment, provided such proceeding was a judicial proceeding, and due notice thereof was given the owner of the property, with full opportunity to be heard.

The court held, however, that the reassessment should have been made by ordinance, and that the reassessment made by resolution was not in compliance with the law and was void.

Upon rehearing, attention was called to a special act of the state, which was designed to validate and confirm assessments or reassessments for public improvements theretofore made by the city in question. The court held that the validation and ratification of an assessment or reassessment which had been found unenforceable, because of some irregularity or defect in procedure, was within the power of the legislature and that the curative act validated the assessment in this case.—*Anderson et al.* v. *City of Ocala,* 91 So. 182.

Special Assessments—Notice—Due Process.—In refusing to enjoin the carrying out of the provisions of a Florida statute providing for the establishment of a road and bridge district and imposing a maximum annual tax of twenty-five cents per acre on all lands included within the district, the federal district court held that the legislature had the power to make assessments without preliminary hearings as to benefits, which would not be disturbed, unless palpably arbitrary; that the levying of a tax of an equal amount per acre upon all the lands in the district was not enough to make the act invalid, and that there was no denial of due process of law, as provision was made under the statute for a hearing upon the amount of the assessment and the taxpayer was given full opportunity to present any and all defenses to the assessment, in the event of a suit to enforce the tax. — *Columbia Inv. Co.* v. *Long Beach and Lakeside Special Road and Bridge Dist.,* 281 Fed. 342.

THE NATIONAL TAX ASSOCIATION

OFFICERS

OBJECTS. The National Tax Association has no creed and conducts no propaganda. Its program is mutual education; its object is to make tax laws simpler, saner, more just and more effective. It welcomes representatives of every creed, school and interest, but its endorsement is given only to those ideas which have the unanimous approval of the voting membership at its annual conferences. With these limitations, its declared object is:

"To formulate and announce, through the deliberately expressed opinion of an Annual Conference, the best informed economic thought and administrative experience available for the correct guidance of public opinion, and legislative and administrative action on all questions pertaining to taxation, and to interstate and international comity in taxation."

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H. L. LUTZ, EDITOR

A. E. HOLCOMB, CONSULTING EDITOR

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The proposal which was advanced in the January *Bulletin* (p. 97) for the combination of the classified property tax with the personal income tax was designed primarily to stimulate discussion of the problem of property and income taxation, and to focus attention upon some phases of the question of the proper position of intangibles in American tax systems. It was not intended, as some of our correspondents have assumed, as an attack upon the Model Tax System, for we expressed approval of the personal income tax as this was outlined in that report. Our proposal was intended to be in the nature of an amendment to that part of the report which deals with the taxation of intangibles. One important reason advanced by the Model Tax Committee for the suggested exemption of intangibles was the failure to secure an adequate listing of such property when subjected to the high rates of the general property tax. To this proposition there would be general assent from all who are familiar with the facts. The report is silent, however, upon the question of low flat taxes on intangibles, although various members of the committee had long been champions of such a tax. In recommending complete exemption of intangibles the report does mention the possibility of double or multiple taxation which would result from the effort to tax intangible property as such, but our assumption in reading this section of the report is that the committee here has in mind the effects that might be expected under the general property tax. At any rate the consequences would be vastly more serious if the double taxation occurred at very high rates than at low rates.

On the other hand, the basic recommendation of the Model Tax Report, which is the combination of a property tax and a personal income tax, was directly attacked in the constitutional amendments offered last fall in Ohio and Colorado, and in Illinois the opposition took advantage of the fact that the new revenue sections did not provide for complete exemption of all personal property as the income tax was introduced (see Mr. Sutherland's comments elsewhere in this issue). The landowner is raising the cry of double taxation when he is made subject to a property tax and a personal income tax, while the owner of intangibles is taxed only on his income.

The retention of the low flat property tax on intangibles will meet this objection, and we think, will meet it effectively. It will then be logical to propose to tax all property as property at some rate, and all incomes as income, at rates varying with the amount.

The whole matter turns, as we see it, upon the possibility of securing a reasonably successful return of intangibles under any system of low, flat rates. If such a classified property tax can be effectively administered, it deserves consideration by the Model Tax Committee as a part of the model system. It goes without saying that this question cannot be decided on *a priori* grounds, nor can we admit as conclusive the evidence from any state that has not undertaken to use effective methods of administration. There are not many states in which strong centralized administration of such a tax is found, and in none of these will the tax commission contend that ideal administrative conditions obtain. Nevertheless we can see no inherent reason why such a tax cannot be as well administered as a moderate income tax. The taxation of intangibles as property at a three-mill rate would strengthen greatly the logical position of the Association in advocating the Model Tax Committee's proposal to impose a direct tax on all property. It would not be seriously open to the charge of double taxation for the classified property tax was advocated for years by the Association as the proper means of combatting the evils of double taxation which arose under the general property tax.

The questions which we have raised are we believe, of great practical importance. We have no desire to dogmatize unduly, and we are by no means dead-sure that the suggestions offered are sound. They are submitted as a basis of discussion and we shall be glad to have an expression of views on the subject, if there are those who agree that the matter is important enough to warrant discussion.

There is another alternative, and the reaction against the income tax which the severe federal rates and the strict federal practice have engendered, cause this form of income tax to be viewed with increasing favor. This is the income tax which is limited to the income from intangibles, as in the Massachusetts tax on interest and dividends. Such a tax would present a solution of the present problem of taxing intangibles, and it would, even in Ohio, in our opinion, produce much more revenue than is now being realized from intangibles.

It is hardly necessary to point out, however, that this is not the personal income tax of the Model Tax System. It is limited to certain forms of income, it cannot be graduated, and the question of exempt minimum income is entirely different from that presented by the personal income tax. Such a tax is not personal in any sense. It might be well for the Committee to consider anew the grounds on which the personal income tax was advocated, with a view to approving or rejecting this variant which is clearly so inconsistent with the main form.

VOLUME 1, NUMBER 1

Some one has said that the saddest words in the English language are "Volume One, Number One". The saying is brought to mind, although in no spirit of doleful prophecy, on receipt of the announcement of the initial issues of two publications to be devoted to different phases of public finance. The first number of the *Nevada Tax Review* was issued in December, 1922, under the auspices of the Nevada Public Economy League. It contains some interesting statistical material relative to the state and local finances of Nevada, together with some pointed discussion of financial problems. The initiative displayed in the publication of such a periodical is very commendable, and deserves to be widely emulated.

Commerce Clearing House announces the first issue of *The National Income Tax Magazine* for January, 1923. The table of contents for the first number gives promise of interesting treatment of important phases of income taxation. May long life and abundant success crown these new ventures in the field of finance!

DEFEAT OF THE ILLINOIS CONSTITUTION

Mr. Douglas Sutherland sends the following comments on the results of the special election in **Illinois:**

In the January *Bulletin* Professor M. H. Hunter closes his comment on the defeat of the proposed Illinois Constitution with the statement that: "the vote of December 12 indicates that the people will have nothing to do with changes which obviously favor large incomes to the disadvantage of the poorer classes."

As one who was closely in touch with the drafting of the recently defeated Constitution, and who was equally closely in touch with the campaign for ratification, as a speaker and otherwise, I disagree with this conclusion.

If the defeat of the constitution could be attributed to the revenue article alone, the adverse vote would have to be explained on the ground that the huge majority of the people, the rich no less than the poor, did not want a state income tax. Those sufficiently well-to-do to pay a federal income tax thought they had enough burden without having the state add to their troubles. The public employes and private citizens with incomes not now taxable under the federal law were unwilling to pay any income tax at all to any government. The fact that the defeated constitution would have made possible some moderation of existing personal property tax evils and injustices seemed to interest very few. The majority of voters of all degrees of financial standing seemed blithely willing to take a chance on continuing to be able to violate the personal property tax laws.

That individuals and corporations with large incomes no less than recipients of small incomes, were hostile to the proposed constitution, was evident to all closely in touch with the situation. A powerful industrial group served notice on the convention that it would accept an income tax provision only if it were uniform, with no legislative power for exemptions, and in such form as would automatically abolish *all* personal property taxes if an income tax law were enacted. In the campaign some influential members of this particular group were among the outspoken champions of the opposition while others worked more quietly but exceedingly effectively against ratification. The best proof of opposition from wealthy citizens lies in the act that it was impossible adequately to finance a campaign for ratification. While it is true that the limitations as to exemptions of income, exemption of personal property from ad valorem tax in conjunction with income tax, and degree of graduation of income tax, were too narrow to have proper place in a constitution, yet they were broad enough to have made possible an income tax law no more discriminatory against what Professor Hunter calls "the poorer classes" than are certain features to be found in the income tax laws of New York, Massachusetts and Wisconsin. In the absence of opposition to other features of the proposed new constitution, and with sufficient campaign funds to get good affirmative propaganda on the revenue section (which was a great improvement over our present constitutional revenue provision) spread abroad early, the opposition would not have been able to lie about the revenue provisions as effectively as it did. I use the word "lie" advisedly because throughout the campaign, statements were made orally and printed anonymously to the effect that every one with an income of $500 would have to pay a tax and that the tax paid by the millionaire would be only three times as great (not in rate but in actual amount) as that paid by the possessor of the $500 income.

Had the union-labor groups been successful in getting the convention to put their plank into the constitution and had the initiative and referendum people not been turned down by the convention, I am confident that the radicals and professional agitators who always assume to speak for Professor Hunter's "poorer classes" would have neglected to complain about the revenue provisions.

The real reasons for the defeat of the constitution are too numerous to mention From somebody's point of view there was an objection not only to every change that was made from the old document, but also because every change that could be thought of was not made.

Cook County was largely offended by a limitation on its representation in *one* branch of the General Assembly, while a considerable element down-state was opposed because Cook County had not been limited in *both* houses. Influential groups

of public employes that formerly had clamored for "home rule" for Chicago, opposed the constitution because they feared the home rule powers granted might apply to their own interests. A source of much opposition was a phrase permitting reading of selections without comment from any version of the Old or New Testaments of the Bible in the public schools. Many "high brows" were against the constitution because it did not go further in shortening the ballot, while several county clerks whose positions were made appointive instead of elective and county officials whose offices were made statutory instead of constitutional did great practical work in rolling up the negative majority.

The revenue article with its mass of details merely supplied a fine set of war gongs against which the campaign opponents could swing their hammers with resounding alarms.

If any lesson is to be learned from our recent Illinois experience as to submission of constitutional revenue provisions, it is that details should be omitted and specific mention of any form of taxation should be avoided if possible. The form of amendment suggested by the National Tax Conference in 1907 is excellent, but probably has been rendered impracticable by the fear of classification which seems so profoundly to have stirred the hearts of our railroad and agricultural friends throughout the country. It may be that we shall have to content ourselves with stating that the rule of taxation shall be uniform, and that there shall be no variations from that rule or exemptions from taxation except by a three-fifths or two-thirds (or some other fraction greater than a majority) vote of the General Assembly.

OHIO'S TAX MEDLEY

And now comes one Isaiah Skeels of Cleveland who deposes and says, in an open letter to the *Cleveland Plain Dealer* under date of December 11th, that the Ohio constitution does not and never has required a uniform rule of taxation. *Mirabile dictu! Fiat Lux!* will wonders never cease? The argument is interesting and ingenious, as may be seen from the following excerpt from Mr. Skeels' comments:

"In the last election a proposed amendment to the constitution was voted on which was intended to give some elasticity to the so-called uniform rule of taxation. And the most surprising thing about the whole matter is that the constitution does not even prescribe any such uniform rule. Those who question this should read Section II, Article XII: 'Laws shall be passed, taxing by uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property according to its true value in money, excepting all bonds at present outstanding of the state of Ohio or of any city, village, hamlet, county or township in this state,' etc.

"Now, mark the word 'otherwise' and its meaning, also the semicolon following it and dividing the sentence into two parts; the first part directing the taxation of intangible values, the second part the taxation of tangible property values. The word 'otherwise' means something different in manner or style or meaning, and can in no sense or reason be construed to mean more of the same nature and kind. Let us requote the first part of this sentence, using the same words and punctuations, only transposing two words:

"'Laws shall be passed, taxing by uniform rule, or otherwise, all moneys, credits, investments in bonds, stocks, joint stock companies,' etc.

"By literal reading of simple wording and punctuation, giving plain dictionary definition to words, there can be no question of what that sentence of the state constitution means. Intangible values shall be taxed by uniform rule, or otherwise. No exemptions being permitted, they must be taxed. The rule for tangible property taxation is simple and direct, being according to its true value in money. While the tax rates on tangible values may be varied, they must be taxed."

Would that the matter were as simple as this! Mr. Skeels' argument may be perfectly sound, and we could certainly wish that it were; but we have, unfortunately, too long a period of sanction for a different interpretation of the language which he quotes to hope for such a painless method of removing the uniform rule.

Ohio needs a Daniel and perhaps a Moses, as well as her Isaiah, before we may expect to reach the promised land of tax reform.

NEW YORK INCOME TAX STATISTICS

The New York state tax commission has recently published a mass of statistics and information concerning personal incomes in New York State. The statistics are based on returns under the state personal income tax law for the calendar year 1920. The statistical department of the tax commission has been tabulating, checking and analyzing these returns for months and now makes public what is declared to be the most complete and informative set of statistics on the earnings of any large group of individuals yet made for any state.

One of the most interesting tables from the point of view of the residents and business men of all the localities of the state is one which reveals the distribution of the larger incomes of New York State residents by cities. For the purpose of finding where the larger incomes are located, a complete analysis was made of the incomes of $5,000 and over. The total number of returns in this class from each municipal incorporation of at least 10,000 population in the state is indicated, together with the returns per 10,000 population, and various other information.

From a consideration of this table, it seems that New Rochelle leads the cities of the state in the proportion of wealthy persons to total population, the ratio of $5,000 and over incomes to 10,000 population being 375.3. New York City's ratio is 131.9. Next to New Rochelle comes White Plains, with 301.0; then Mount Vernon, 268.0. At the end of the list comes Lackawanna, with a ratio of 11.2 returns of income of $5,000 or more to 10,000 population.

That many of the commuting localities in the vicinity of New York would have a high ratio would be expected. In this connection the report says:

"In those cases where a person receives his income from one geographical section and spends it in another we might consider the two together as constituting his economic residence. Many of the cities of New York are to a large degree only fractions of such complete economic units. There are such cities as Mount Vernon, New Rochelle and White Plains constituting colonies of wealthy New Yorkers. Then there is Lackawanna forming one of Buffalo's workshops. Per 10,000 population New Rochelle has 33 times as many residents with incomes of over $5,000 as has Lackawanna.

"The table will confirm many general impressions as to the geographical distribution of New York's wealthy residents. It will also furnish some surprises. Per 10,000 population Albany is shown as having 73 returns of over $5,000 income, while Troy is shown as having 83. The question arises: Is this relative showing accurate or is it due to evasion of the tax in Albany? Lockport's rate compared to that of Saratoga Springs is only 27.7 per cent, one of the three smallest percentages in the state, and what would be expected of a city of large investment securities."

Of the total of 1,149,968 returns filed for 1920, 112,127 were from residents reporting income of $5,000 and over. The number of these returns per 10,000 population in New York City is 131.9. In the state outside New York City it is 79.7. The urban ratio — that is, the number of $5,000 and over returns in incorporated places over 10,000 in population—is 121.3. In the rural places the number is 60.6.

Another column in this table shows for each place the average size of income of $5,000 and over. In this column Ossining leads the individual places with an average income of $15,966; New York's average is second, $15,898; and Amsterdam is third with $15,506. The lowest average income, $7,800, is found in Dunkirk.

DEPRECIATION AND AMORTIZATION

JOHN A. ZANGERLE
Auditor of Cuyahoga County, Cleveland, Ohio

No subject is so involved in uncertainty and confusion as the question of the rate of depreciation, both structural and obsolescence. Hundreds of thousands of investors, especially in buildings, are utterly at sea as to whether their investment is a profitable or a losing venture. They have only a very hazy and indefinite idea as to whether a given expected income will have extinguished their investment when the building finally becomes valueless. The standard depreciation generally used by Cleveland investors applicable to Cleveland buildings seems to be 2% to 3%. Federal Income Tax Administration permits, I believe, from 2% to 3% annual depreciation rates for cement or brick buildings and 5% for wooden buildings — a very unscientific discrimination, when it is borne in mind that a brick and a wooden building vary generally only as to the exterior construction, which may constitute 10% to 15% of the total cost of the building.

As a rough-and-ready rule of thumb, such general depreciation rates may be permissible. Investors should know, however, that these figures are not scientific, and that they are unnecessarily high and unreliable from an investment standpoint. If, for example, the probable life of a building, not considering possible obsolescence, is 50 years, the ordinary investor will charge off 2% per annum. But if this annual depreciation charge is set aside, invested in interest-bearing deposits at 4%, or investments of stock and bonds at 5% or 6%, and if such annual profit is annually re-invested, the investment is recovered or amortized within a much shorter period than 50 years. If 2% is invested and annually re-invested at 4%, the original investment becomes extinguished in 27½ years. If invested at 5%, it becomes extinguished in 25 years, and if a rate of 6% is secured, it will extinguish the investment in 23.6 years.

The proper annual charge for depreciation in order to finally realize the original investment is dependent, first, upon a proper estimate of the probable life of the building, and second, on the rate of investment and re-investment. Let us assume different cases, respectively when the expected life of the building may be 40, 50 or 60 years. If the building has an expected life of 40 years, it having cost $100,000 to construct, it will require,

If re-invested at 4%, an annual depreciation of $1,011.90 or approximately 1%.
If re-invested at 5%, an annual depreciation of $788.40 or approximately .79%.
If re-invested at 6%, an annual depreciation of $609.60 or approximately .61%.

In other words, at 4% invested and re-invested a charge off of $1,011.90 or about 1% will amortize the investment in 40 years (instead of the apparently necessary charge of 2½%). If invested and re-invested at 6%, less than ⅔ of 1% must be set aside annually.

If the building has an expected life of 50 years, it will require,

If re-invested at 4%, an annual charge of $629.80 or approximately .63%.
If re-invested at 5%, an annual charge of $545.90 or approximately .45%.
If re-invested at 6%, an annual charge of $324.90 or approximately .32%.

In other words, if the depreciation charge is invested and re-invested at 4%, a charge off of less than .63%, it will require the insignificant rate of approximately ⅓ of 1% to be charged off annually.

If the building has an expected life of 60 years, it will require,

If re-invested at 4%, an annual charge of $404.00 or approximately .40%.
If re-invested at 5%, an annual charge of $269.40 or approximately .27%.
If re-invested at 6%, an annual charge of $177.00 or approximately .17%.

From the foregoing, if the depreciation set-off is re-invested at 4%, it seems that the investment will be recovered when the building finally becomes valueless by charging off a rate of about ⅖ of 1%, while at 6% about ⅙ of 1% annually re-

invested will recoup the investment. So with machinery, 10% annual depreciation will at 4% amortize a $100 outlay in 8.88 years, while if re-invested at 8%, a 10% annual depreciation will amortize a $100 charge in only 7.25 years.

Some owners claim that a 2% depreciation charge is not ample, insisting on a 3% depreciation charge. A 3% rate invested at 4% would kill the original charge in 21 years, at 5% in 19.79 years, and at 6% in 18.3 years. When it is borne in mind that many residences in Cleveland have been up for fifty years and that several office buildings with a very small outlay are in a good state of physical condition and still good producers 20 years after their construction, it is evident that a 3% charge for depreciation is excessive, unless the burden of investment and re-investment is regarded as an unreasonable obligation imposed on the investor. There is certainly no burden and little risk in depositing such depreciation charge with savings banks at 4%. To require an investment at 6% might necessitate some allowance being made by way of insurance for eventual losses in more hazardous investments and in the case of individuals, some allowance for management of the fund. However, when the depreciation is re-invested in a going business by a corporation making 6%, 8% or 10%, management of such fund by an existent and continuing organization would permit very little charge for such added duty. Even if such allowance be made, it is evident that the general notion of a proper depreciation rate must undergo a radical revision. Considered in the light of these conclusions, Cleveland buildings will show a far greater return than owners themselves realize.

METHODS OF ASSESSING RAILROAD PROPERTY FOR TAXATION

Address of NILS P. HAUGEN, before the Railway Real Estate Association, Chicago, October 11, 1922

With the constant increase in public expenditures, federal, state and local, taxation has become the subject of much discussion, contention and dispute. The popular demand has increased for better roads, more efficient schools, and more of them, better sanitary conditions, police protection, pension funds, bonuses, etc., and taxes are likely to keep on increasing for a time at least. In this increased public burden railroads have no doubt in most of the states borne at least their full share; nor have they been reluctant or unwilling to take their part, if properly apportioned and equalized. Railroad property is so obviously in sight that it cannot escape the attention of the assessing officials.

The question of finding a proper method of ascertaining what the equitable share of railroads shall be for taxation may be perplexing and difficult, and must depend upon the impartal judgment of the assessor or assessing body. Taxation is not an exact science. All that can be expected is honest effort to do impartial justice.

Two general methods have prevailed for the taxation of railroads: one, the gross earnings or license tax; the other, the ad-valorem tax. The tendency during the last twenty years has been to replace the former with the latter. The gross earnings tax has the merit of being simple in administration, but it does not readily respond to the varying rates of taxation of other property, and is therefore likely to violate the rule of uniformity generally prescribed in state constitutions. It is also likely to become the shuttlecock of politics as a change in rate can, as a rule, be authorized only by the legislative body.

I shall in this paper confine myself more particularly to a discussion of the ad-valorem tax, with which I have had experience as a member of the Tax Commission of Wisconsin. My discussion will relate principally to interstate properties, as all larger systems fall under this head, the interstate properties raising the question of valuation only.

ADVALOREM TAXATION OF RAILROADS

A division of the subject into subheads naturally suggests itself, and I shall endeavor to treat:

First—unit valuation;

Second—allocation of the unit value to the states;

Third — equalization between railroad property and general property subject to local and state taxes—or the tax rate.

It is not infrequently claimed that property is worth what it costs, or what it would cost to replace it. That cost cannot be entirely ignored when a newly constructed property is under consideration, whether it be a building or a railroad, is quite apparent. There may be in such case no other measure of value. But it is equally apparent that a railroad well established in business, with favorable connections with other systems of transportation, may have a value far greater than the cost of reconstruction. On the other hand, a railroad running into a forest which is being rapidly cut off, or built to serve a mine approaching exhaustion, with nothing material to take the place, may approach the time when the only measure of value is scrappable value. A number of smaller properties built into the forests of northern Wisconsin have gone through this experience during the last dozen years for reasons indicated, and as the time for dismantling the property approached, the value for taxation or any other purpose naturally diminished, or almost disappeared.

It is perhaps natural for the average person to jump at the conclusion that the value for rate-making and taxation should be identical; but different principles control and are recognized by the courts and by investors. In rate-making, the Interstate Commerce Commission and the state railroad commissions have in view a rate that will yield a fair return on the investment. This naturally and necessarily points to cost. The taxing authorities, on the contrary, are directed to find the true value of a going concern, the law generally and specifically including in the valuation not only the physical property but also the value of the franchise. If it were possible so to adjust rates that a fair return were permanently assured, the results of the two methods would naturally approach each other and a fair rate of capitalization for taxation purposes would correspond with a fair rate of authorized income for rate-making purposes. Experience, however, shows that the rates cannot be thus definitely adjusted and maintained after adjustment.

Like other property, that of railroads receives its value from its earning capacity, its value being reflected in its net earnings, and also in the selling price of stocks and bonds. The value, therefore, does not depend upon the cost of reproduction, or the original cost; and upon this point the decisions of the courts are clear. The most expensive parts of a road as to construction are frequently, and I may say generally, the least profitable. Cost of maintenance and operation through tunnels, over bridges and heavy grades must be compensated by that part of the line less costly in construction and maintenance. It has been well stated thus: "For rate-making purposes the question is what has gone into the property; for taxation purposes what comes out of it." The view thus expressed is fully recognized by investors and students of the market. When net earnings fall off, prices of stocks and bonds are certain to follow. There may be temporary fluctuations, and the statement here made has reference to longer swings in the market. Valuation is necessarily a matter of judgment on the part of the assessor, and as circumstances vary in the different corporations, no hard-and-fast rule can be prescribed. This has been especially emphasized since government operation and the abnormal conditions in industry and transportation which it seems to have entailed. Whether the capitalization of net earnings or the valuation of stocks and bonds shall be used as the basis must depend upon the particular corporation. Before the Government took over the operation of the railroads, the larger companies operating through Wisconsin showed constant and steady net earnings, but for some reason the net earnings since that date have become uncertain and fluctuating, not only for the systems as a whole, but as to that portion of the net earnings assigned by the comptrollers to the different states. In many cases, even in those of the stronger companies, net earnings disappeared. Take the Chicago, Milwaukee & St. Paul Company; in 1920 it showed a deficit, and in 1921 a relatively small amount of net, whether the single year or a five year average be taken. It left nothing material to capitalize. Still no one will question that this great transcontinental line is a very valuable property with immense potential value for service and re-

turn. Its stocks and bonds, while suffering from the general depression, reflect a value in the market far above that indicated in recent years by its net earnings. The public evidently has confidence in its future, if the stock and bond market be taken as evidence, and I know of no better criterion in such a case.

But an interstate railroad is subject to different jurisdictions and different methods of taxation. How shall its value for the different states be arrived at? That part of a railroad passing through a state cannot be valued separately or turned away from its established connections without destroying its efficiency for service or its value for taxation. The railroad must therefore be valued in the first instance as a whole, for the reason that it cannot be assessed properly otherwise than as a unit. When you destroy the unit you destroy the value.

The basis of assessment of railroad property within a state is its " value ", and many cases dealing with the subject of taxation show how the courts have defined " value " and the methods for ascertaining it. The result may be summarized by saying that " value " depends upon the extent and profitableness of the use of the property, that is, upon its earnings. One of the leading cases upon the subject is *Railway Co.* v. *Backus* (154 U. S. 439), where the court said:

" The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon value. But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value, it is taxed upon something which is created by the uses to which it is put."

In *Adams Express Co.* v. *Ohio State Auditor* (166 U. S. 185) the company claimed that it should be assessed only upon property within the state, such as horses, wagons, etc., the same as though such property had belonged to a farmer of the state. The total value of these classes of property owned by the express company everywhere was $4,000,000, although it was conceded that the total value of its business and property was $16,000,000. The court had held in 165 U. S. 194, that the Ohio assessment of $275,446 was proper although the value of the tangible property, such as horses, wagons, etc., of the company within Ohio was only $23,430. On the motion for rehearing, Judge Brewer used the following language:

" Now it is a cardinal rule, which should never be forgotten, that whatever property is worth for the purposes of income and sale it is also worth for the purposes of taxation. Suppose such a bridge were entirely within the territorial limits of a state, and it appeared that the bridge itself cost only $1,227,000, could be reproduced for that sum, and yet it was so situated with reference to railroad and other connections, so used by the traveling public, that it was worth to the holders of it, in the matter of income, $2,900,000, could be sold in the market for that sum, was therefore in the eyes of practical business men of the value of $2,900,000, can there be any doubt of the state's power to assess it at that sum, and to collect taxes from it upon that basis of value? Substance of right demands that, whatever be the real value of any property, that value may be accepted by the state for purposes of taxation, and this ought not to be evaded by any mere confusion of words. Suppose an express company is incorporated to transact business within the limits of a state, and does business only within such limits, and for the purposes of transacting that business, purchases and holds a few thousands of dollars' worth of horses and wagons, and yet it so meets the wants of the people dwelling in that state, so uses the tangible property which it possesses, so transacts business therein, that its stock becomes in the markets of the state of the actual cash value of hundreds of thousands of dollars. To the owners thereof, for the purposes of income and sale, the corporate property is worth hundreds of thousands of dollars. Does substance of right require that it shall pay taxes only upon the thousands of dollars of tangible property which it possesses?"

" According to the return filed by it with the auditor of the state of Ohio, as shown in the records of these cases, its

number of shares was 120,000, the market value of such shares being $140 to $150. Taking the smaller sum gives the value of the company's property taken as an entirety as $16,800,000. In other words, it is worth that for the purposes of income to the holders of the stock, and for purposes of sale in the markets of the land. But in the same return it shows that the value of its real estate in Ohio was only $25,170; of real estate owned outside of Ohio $3,005,157.52, or a total of $3,030,327.52; the value of its personal property in Ohio $42,065, of personal property outside of Ohio $1,117,426.05 or a total of $1,159,401.05 — making a total valuation of its tangible property $4,189,818.57; and upon that basis it insists that taxes shall be levied. But what mockery of substantial justice it would be for a corporation whose property is worth to its stockholders, for the purposes of income and sale $16,800,000, to be adjudged liable for taxation only upon one-fourth of that amount. The value which property bears in the market, the amount for which its stock can be bought and sold, is the real value. Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its power to produce income, or for purposes of sale."

The courts have also repeatedly held that cost of reproduction is not "value" for taxation purposes. It is properly used for rate-making purposes, but does not necessarily represent "value" as that term is used by the courts. In the case I have referred to, Judge Brewer expresses himself on this point as follows:

"Take for illustration, property whose sole use is for purposes of interstate commerce, such as a bridge over the Ohio between the states of Kentucky and Ohio. From that springs its entire value. Can it be that on that account it is entirely relieved from the burden of state taxation? Will it be said that the taxation must be based simply on the cost, *when never was it held that the cost of a thing is the test of its value?* Suppose there be two bridges over the Ohio, the cost of the construction of each being the same—one between Cincinnati and Newport, and another 20 miles below, and where there is nothing but a small village on either shore. The value of the one will, manifestly, be greater than that of the other, and that excess of value will spring solely from the larger use of the one than of the other."

And in the Monongahela Navigation Company case, which I believe was a condemnation proceeding, Judge Brewer said:

"The commerce on the Monongahela river, as appears from the testimony offered, is great; the demand for the use of this lock and dam constant. A precisely similar property, in a stream where commerce is light, would naturally be of less value, for the demand for the use would be less. The value, therefore, is not determined by the mere cost of construction, but more by what the completed structure brings in the way of earnings to its owners."

It seems impossible to take this rule of value as laid down by the courts and apply it to a part of a property which is from its very nature a unit; but some states require its assessors to do this. Such seems to be the case in Illinois where the local authorities assess station buildings and other properties of railroads in their respective districts.

And in Montana the statute provides:

"The depots, stations, shops and buildings erected upon the space covered by the right of way and all other property owned or leased by such person, corporation or association, except as above provided, are assessed by the assessor of the county wherein they are situate."

The exception referred to is the general provisions that the state board of equalization shall "assess the franchises, roadway, road bed, rails and rolling stock."

The Montana law provides that property shall be assessed at its full cash value, which is defined to be "the amount at which the property would be taken in payment of a just debt from a solvent debtor." What would a creditor be willing to take a station building at, or a round-house, or a turn-table in payment of a debt? The law is an absurdity. It provides definitely that rolling stock shall be assessed by the State Board, and there has been no question but that locomotives shall be included in the assessment by the State Board; but since the electrification of the Chicago, Milwaukee & St. Paul Railroad ambitious local assessors have reached out and assessed the transformation stations. The locally elected assessor falls to the temptation to draw into his assessment district as much of this unit property as he can

lay his hands on. The electric machinery is certainly as much a part of the unit as is the locomotive of which it has merely taken the place in furnishing the motive power. Montana, like Iowa, distributes the value to the local assessment districts and subjects it to the local rates, but Iowa at least leaves such allocation to the State Board. It seems entirely illogical to assess the unassembled parts of a great machine and thus try to arrive at the full value of the unit.

Treating of this question of unit valuation as applied to public service corporations, the Supreme Court of Wisconsin in *Washburn* v. *Washburn Waterworks Co.* (120 Wis. 575), said:

"It has been as firmly established as anything can be by judicial determinations that all the property of a public service corporation such as appellant, street and other railway companies, and public lighting companies, whether real, personal or mixed, in the ordinary sense of those terms, including franchises other than the mere right to be a corporation, is one entire indivisible thing; that all the parts partake of the nature of the franchise from which springs the public duty. In that view it would be the height of absurdity to consider value and impose a tax upon one part of such entire thing separate from the rent. There can be no separation without destruction. Therefore the separate value of the parts in the aggregate would not necessarily approximate to or be any legitimate measure of the value of all the parts, viewed as one complete machine, so to speak. The franchise by itself would be valueless. . . . The great value is produced by the combination of parts into one complete working machine adapted in a high degree to the service of man. One might as well endeavor to value one part of any mechanical device by itself as to value the franchise of a public service corporation by itself, or so value its land, or likewise its movables. To do so leaves out of view the great and often chief element of value which is produced by the combination."

The Pullman case recently decided in Wisconsin confirms this principle.

STOCKS AND BOND VALUE

It is no doubt true that if a person could buy all the stocks and bonds of a railway company, he would by that very act become the owner of the property. Stocks and bonds, however, are not dealt in as a rule to acquire ownership, but rather as investments. The purchaser looks to the returns upon his investment, perhaps also to a rise in the market with a view to selling. This would no doubt apply more frequently to stocks than to bonds. Under normal conditions as they existed until 1917, stock and bond valuations reaching over a period of five years were fairly constant with a steady and practically uniform upward trend. The same was true of net earnings — the latter no doubt being the cause of the former. It is undoubtedly advisable in considering the stock and bond method of valuation, and also the net earnings, to look to more than a single year, and a five-year period seems to be reasonable. It aids in smoothing over sudden fluctuations and tends to a more constant level by removing the high peaks and filling up the low depressions.

In assessing railway property it is of course the operated property only which is considered, and this presents a difficulty in using the stocks and bonds as the basis of value. The corporation may hold other property not used in operation, like the Northern Pacific which has a large land grant still unsold. The Northern Pacific and Great Northern so-called "Joint Bonds" present a somewhat similar feature. These bonds were issued by the companies named in 1901 to take up the stock of the Burlington, and in fact took the place of such stock. They were therefore primarily an obligation of the Burlington rather than of the companies issuing them. The Burlington stock disappeared from the market when the bonds were issued and it seems reasonable to consider the bonds as representing the stock of the Burlington in the assessment of the latter company, and not to consider them as obligations representing values of the Northern Pacific and Great Northern, and this course was followed by the Wisconsin Tax Commission. Other outside holdings will suggest themselves, and the weight that should be given to them is not so easily determined. Where such holdings consist of stock representing non-productive property, held for possible but indefinite future use, it is not likely that they materially affect the value of the stock of the operating company, and it

would be still more remote to say that they would affect the value of the bonds of such company.

Where proper elimination of outside holdings can be made, the stock and bond values of railroads averaged over a period of five years seem to correspond most closely to that full and true value which the assessment laws generally prescribe. It it well, however, to consider other methods for comparison purposes as they serve the assessor in verifying his approach at full value; and in this respect net earnings undoubtedly afford the best test.

CAPITALIZATION OF NET EARNINGS

In capitalizing net earnings it is always a question what rate shall be used. We know that during recent years interest has been high, and a more liberal rate would therefore be proper for capitalization purposes. It makes a vast difference in the valuation of one of our large railroads whether the capitalization be at 7% or 6%. With the exception of recent months, the general interest rate has been abnormally high during the last few years, and the bond market has responded to these high rates, thus indicating depreciated valuations. If the assessor adopts a straight rate of capitalization of the entire net earnings, he must necessarily act somewhat arbitrarily in choosing his rate. A better method which has appealed to me is to deduct the interest paid from the net earnings, capitalize the remainder and add the market value of the bonds. Take for instance a company whose average net is

	$3,933,660
Deduct interest paid	2,313,578
Leaving remainder	$1,620,082
Capitalize at 7% equals	$23,144,018
Add market value of bonds	44,554,290
Making system value	$67,698,308

The advantage of using this method is that so much of the net as is represented by the bonds is capitalized at the actual rate to the investor, and is free from the bias or arbitrary judgment of the appraiser. The remainder represents the equity of the stockholders and should be favored with a more liberal rate. Where the market value of stocks and bonds can be arrived at as suggested above on a five years' basis, a medial of the two methods would seem to be reasonable and fair. The capitalized method referred to above I have copied from an appraisal that has come under my observation, and using the stock and bond value for the same company during the same period resulted in $69,225,313. The capitalization method was $67,698,308, and the average of the two is $6,461,810.

Present day valuation based on the five-year period from 1917 to 1921 inclusive would, as a rule, result in a higher valuation than taking the year 1921 alone, but with the present upward trend of the stock and bond market, and also of the earning capacity of railroads, I am of the opinion that it is fair to the railroads and fair to the public that the five-year average be adhered to. The present strike seems to be adjusted and we may reasonably look for an upward trend in net earnings that will gradually restore the equilibrium of the pre-war period.

ALLOCATION OF THE UNIT VALUE TO THE STATES

Having arrived at the value of the system, the next step is to allocate such value to the different states into which the property extends. No absolutely precise method can be prescribed. In former years the Wisconsin Tax Commission used for this purpose an average of gross earnings, net earnings, and all track mileage in the state to the system. In recent years the net has become so reduced and irregular that it seems to offer no reliable aid in the distribution of values, and has therefore been omitted in the calculations. The commission has added other elements for purposes of distribution, and the factors that seem the most reliable in arriving at equitable results may be reviewed as follows:

First: all track mileage. This recognizes the physical property in each state and reflects value better than main line mileage, as it indicates density of traffic through double tracks, spurs, sidings, yard tracks, etc.

Second: gross earnings. This is naturally an important item as an evidence of business transacted in the state. It includes, or should include, not only interstate business but the proper portion of interstate business and transtate business as well.

Third: car and locomotive mileage.

This emphasizes the relative importance of the different parts of the system and is definite and certain. Each state gets its share of the traffic in and through the state.

Fourth: ton and passenger mileage, or as it is called, traffic unit. This is based upon the same principle as car mileage, but reflects value more accurately through earnings, for the reason that empty cars earn no money while carrying them does incur expense. Tonnage means earnings. For purposes of expediency the number of passengers carried one mile may be added to the tons carried one mile and one percentage used for the two. This gives a passenger the same weight in statistics as a ton of freight.

In order to arrive at the proper percentage of value to be assigned to the state, an average of the percentages thus ascertained seems to be approximately accurate and fairly equitable. By taking the entire system and ascertaining the percentages thus calculated for each state, no state would suffer from discrimination, and it would be evidence of the fairness of the appraiser to thus allocate the value of the unit, not only as to his own state but to each of the states interested.

EQUALIZATION BETWEEN RAILROAD PROPERTY AND GENERAL PROPERTY

One of the most important and also the most difficult of the problems presented in the assessment of railroads is to reach a fair adjustment for taxation purposes between railroads and other property of the state. I allude to the method pursued in Iowa, Montana and some other states in this regard. In those states the value of the property is assigned to the different subdivisions of the state in which it is located and subjected to the local rates. It is readily seen that if railroad property is assessed at its full value and other property is assessed by the local assessor at only a percentage of true value, there is an unjust discrimination in such allocation against railroad property. This question has been a subject of contention and must necessarily remain so unless the state tax commission or some similar authority having the power, either reduces the value of railroads to correspond to the local assessments, or increases the local assessments to the 100 per cent basis. Where the railway property is distributed to the several local communities and subjected to the local rates, this is an extremely difficult task to accomplish. It is notorious that many local assessors do not assess property at full value, and that there are inequalities in the ratio of assessed to true value in the assessment districts. This situation is not peculiar to any one state. It may be said to be universal where local assessors act independently of centralized authority. In Wisconsin where the railroad tax is paid into the state treasury and becomes a part of the general fund, the difficulty has been fairly well overcome, as the tax commission raises the local valuations in each county up to the true value. The railroad properties are not subject to the local rates but take the average tax rate of the state, arrived at by dividing the full valuation as found by the tax commission into the sum of all taxes levied upon the property locally assessed. The full valuation of the latter property is arrived at by comparing the assessments of the property sold in each district with the consideration paid for such lands. The formula may be stated as follows: As the assessment of the land sold is to the consideration paid for such lands, so is the assessment of the entire assessment district to the full value of such district. This course of arriving at the value of the general property in the state has been pursued in Wisconsin for twenty years and has resulted in steady but increasing values in the different counties, using the five years' average as a basis.

As the assessments vary in the different districts, reducing the railroad property as a whole would punish those districts having the best assessments and reward those that failed to approach full value prescribed by law. In arriving at the true value of the district, or county, no better method has presented itself than that of sales. While a single sale may not tell the exact truth as to the value of property, the number of sales made in a county or district during a five-year period would present facts that can hardly be questioned. Only bona fide sales should, of course, be used in arriving at the ratio of assessed to true value, and the necessary data should be gathered by agents independent of local influences.

The Tax Commission of Wisconsin in arriving at the true value of assessment districts and counties have in this respect

adhered to the five years' average. From 1903 until 1918 the increase in land values not only in Wisconsin but throughout the West corresponded fairly well with the increase in the value of railroad properties. Since that time, however, railroad valuations based either upon net earnings or stocks and bonds have decreased while land values, although they have not materially increased, have still held their own on the basis of the five years' average. If there is any better method of ascertaining the true value of property than by sales, it has not been suggested to the Wisconsin commission.

I have referred above to the great irregularity in recent years on the part of railroad companies in reporting their net revenue for the system and for the states. As an instance, the Chicago and Northwestern Railway Company reported for 1920 a deficit of $3,182,859 for the system, but credited Wisconsin with net earnings amounting to $7,597,408 and showed a deficit in both Iowa and Nebraska. The same irregularities appeared in the reports of other companies.

The inequalities in taxation and the injustice imposed upon railroad companies are largely due to the failure of public officials to impartially and fearlessly perform the duties which the law prescribes. Any law-abiding community should insist that its officers follow the law as the first requisite to that protection of person and property which government is organized to secure. When public opinion shall demand that assessors follow the law, the mandate will be obeyed. The assessor is constrained to violate the law and his oath of office by force of long-established custom and the expectation, or at least the acquiescence of his constituents, that the custom be followed.

Chief Justice Ryan, one of the ablest men who have occupied the bench of the Supreme Court of Wisconsin, in a case where it was shown that the assessor had assessed all the property in his district at one-third of its actual value, said:

"It was intimated, as it has been on other occasions, that the statutory rule of assessment is frequently or generally disregarded by assessors, and that the consequence of holding assessors to a compliance with their duties under the statute and the constitution would be disastrous."

"If it be true that assessments throughout the state are frequently or generally, or universally made in defiance of the statutory rule, it appears to me better that the state, and the municipal corporations of the state, should suffer inconvenience than that our whole system of taxation should, at the mere will of local officers, be a fraud upon the constitution and statutes carefully framed in compliance with the constitution. . . ."

"If the assessor make and annex the affidavit to an assessment made in violation of the statutory rule, he takes an absolutely false oath in the execution of his office. What faith can be reposed in an assessment so made and so verified? *Falsus in uno, falsus in omnibus.* What security is there that such an assessment is just, equal and honest in other respects? . . . If they (the assessors) should be suffered to substitute a rule of their own for the rule of the statute, and yet uphold their assessment by an oath that they have followed the statutory rule, it appears to me not extravagant to say that taxation in this state would rest less upon a uniform rule of assessment than upon a uniform rule of fraud and perjury."

"I am quite sure that no argument of inconvenience will ever induce this cour to lend its sanction to such deliberate fraud perpetrated in the name and by the authority of the state in a proceeding which purports to be a just and uniform exercise of sovereign power. It seems to me that would be a wanton abuse of judicial power."

Assessments can never be absolutely perfect. Judgments will differ, and valuation is largely a matter of judgment, but the public does have a right to insist that the officials exercise their best judgment in arriving at true value for public purposes, and that such judgment be exercised honestly, impartially and based upon the best data available. If Wisconsin deserves any credit for better administration of its taxation laws, it is largely due to the efforts of the tax commission to enforce the assessment laws as they stand. It means, in other words, that central authority, free from local and political influences, is essential to reach the results which justice and equity demand with reference to the taxation of railroads as well as other property.

Railroads are eminently state-wide in

their character and should be viewed and assessed upon that principle. This view would naturally be opposed by interested districts in states where values are distributed and taxes collected by local districts. But it certainly seems unfair to take this large source of revenue created by all the people of the state and distribute it to a few favored localities. That it leads to extravagance in many cases has been fully demonstrated in states where the system prevails.

Railway corporations, because of the magnitude of their operations, and dominating power which they possess in the business world, referable to the special franchise feature of their property, the closeness of touch between them and every inhabitant of the state and every dollar of value therein, by reason of which their legitimate prosperity and that of the people individually and collectively are inseparably bound together, are most significantly a class apart from all other corporations and are more nearly a part of the government itself than any other quasi-public agency. They touch the every-day life of every member of every community from the center to the most remote parts of the state. And as they have to do at all points with the well-being of the people, so they are dependent upon the people for support and protection. It is plain that the mere taxing district accidentally touched by the road is not the limit of its influence or prosperity.

It has not been my experience that railroads shirk or evade their share of the public burden. They ask for that fairness and equity in administration of the tax laws to which every taxpayer is entitled. I can also cheerfully add that while differences have arisen as to proposed valuations, the statistics and data submitted by the railroads were never questioned as to their accuracy while I served on the tax commission of Wisconsin.

REPORTS OF STATE TAX COMMISSIONS

Michigan

The 12th report of the Board of State Tax Commissioners of Michigan covers the biennial period 1921-22. The report surveys the activities which have engaged the attention of the Commission during the past two years, discusses the conditions of assessment and taxation over the state, and outlines certain remedies which the Commission proposes for the relief of these conditions. The Commission comments upon the rapid increase of public expenditures and public debt in Michigan and as proposed remedies for the situation they suggest a more general diffusion of accurate information with regard to financial matters; the deliberate reduction of appropriations by the legislature in the interests of economy, the development of new sources of revenue, and the levy of increased contributions upon various objects of taxation now inadequately taxed. The Commission volunteers to furnish speakers qualified to discuss the subject for clubs and other organizations desiring addresses on the subject of taxation. The reduction of appropriations they point out should be carried through with regard to the legitimate needs of a community and they very properly refer to the experiences of Ohio with tax limitation laws as a warning to other states. The Indiana system of rate control is recommended instead. New sources of revenue are proposed in the nature of a specific tax on moneys and credit, a moderate tax on gasoline for highway purposes, an income tax, and increased taxes upon certain classes of corporations, such as insurance and trust companies, and various other increases.

Tennessee

The first biennial report by the State Commissioner of Taxation for Tennessee also covers the biennial period 1921-22.

This report outlines the development of modern tax administration in Tennessee and summarizes in a very interesting way some of the conditions which were prevalent under the old régime. The entire report is a lengthy document of more than 400 pages filled with important material relative to the operation of the tax system in Tennessee and the results of the first

years of centralized tax adminstration, including a number of leading court decisions and administrative rulings relative to the interpretation and application of the law. It is not surprising, however, to learn from this report that the assessment of intangible personal property under the methods now in vogue is very unsatisfactory, except in the case of domestic manufacturing corporations, banking institutions and certain other incorporated concerns. The tax commissioner recommends the most careful economy in public expenditures: the introduction of a state and county budget system; the reorganization and consolidation of useless state departments and offices; the improvement of the local assessing machinery by better provision for the compensation of assessors; and the introduction of certain new taxes, such as a tax on gasoline, personal income tax, and an amusement tax. We are unable to agree with the recommendation of the report for the separation of the sources of revenue for state and local purposes. The report itself is not consistent on that point, for it emphasizes the relatively low percentage of the total taxes levied which are absorbed by the state for state purposes, and in recommending the separation of sources the statement is made that no improvements in the administration of the property tax can correct the situation of inequitable taxation which exists in Tennessee, until the present burden of state taxation is removed from the property taxpayers.

Indiana

The annual report of the State Board of Tax Commissioners of Indiana to the General Assembly for the year 1922 is a brief pamphlet of 19 pages. The Commission summarizes briefly the development of centralized administration in Indiana from its beginning in 1891. It is to be regretted that the Commission has not seen fit to discuss more fully the operation of the system of controlling local expenditures and local indebtedness which has been introduced in Indiana. The recommendations relate chiefly to certain changes in the tax law of administrative importance or of local interest only.

Nebraska

The report of the State Tax Commissioner of Nebraska for the year 1921 is simply a reprint of certain minutes of the State Board of Equalization and of the statistical tables embodying the results of the State Board's work of equalization.

Vermont

The biennial report of the Commissioner of Taxes of the State of Vermont covers the period ending June 30, 1922. The report is very largely statistical in character. A brief discussion is presented to show the varying basis of assessment and certain recommendations are presented to correct this situation. The first is the abolition of the practice of exempting privately owned property of a private nature from taxation and the gradual restoration to the taxable list of this class which is now exempt. The second recommendation looks to the introduction of state revenue of local assessments and a re-appraisal of property when this is found to be necessary. This is one of the most important powers of any state tax commission. The third recommendation is for the introduction of a personal income tax and the restriction of property tax to physical property.

Ohio

The twelfth annual report of the Ohio Tax Commission is for the year 1921. This report, unfortunately, is also largely statistical in character. The Ohio tax commission has never been guilty of wasting much time in its annual reports on mere words, but the present report is even less wordy than some of its predecessors. In view of the continual turmoil over taxation in Ohio, silence may be deemed by the tax commission to be the better part of valor. But there must be leadership somewhere, and it is to be regretted that the tax commission has not seen fit to devote more of its time—and of the space in its annual reports—to consideration of the fundamental issues involved in the state's financial muddle.

New York

The annual report of the State Tax Commission of New York for the year 1921 is the first to be issued since the consolidation of the tax administration provided for by legislation enacted in 1921.

This legislation transferred to the jurisdiction of the tax commission the supervision of certain important taxes which had hitherto been handled by different state officials. Among the taxes which were thus brought into the tax commission fold were the inheritance tax, the personal income tax, the stock transfer tax and the motor vehicle tax. The experience of the past six months indicates, according to the report, that material economy in administrative expenses is being achieved, while the reorganization and consolidation of administrative activities thus made possible has increased the administrative efficiency of the whole department. The report reviews briefly the work of the ten bureaus which have been created, and discusses some of the problems which have arisen in each. The statistical section contains the usual tables, with the addition of an interesting analysis of the statistics of income compiled from the returns for the year 1920 (pp. 371-427). A useful digest of tax provisions in the different states is presented on pp. 63-82.

The Commission recommends, among other things, a tax of 1c. per gallon on gasoline, a substantial increase in the license tax on trucks, and the review of the entire subject of the exemption of real property from taxation.

Oregon

The seventh biennial report of the State Tax Commission of Oregon is dated 1923, and is presumably intended to cover the work of the tax administration years 1921 and 1922. The report is very largely statistical in character. The brief text accompanying the tables contains comments on the relative increase of state, county and local taxes, and on the desirability of introducing a state income tax. It is a distinct shock to learn that the tax department has only $9570 for all expenses, including salaries, traveling expenses, blank forms and all other expenses. This is "saving at the spigot and wasting at the bung" with a vengeance!

South Dakota

The South Dakota Tax Commission's annual report for the year 1921-1922 covers the work of the tenth year of the commission's existence. The report contains less than six pages of text, which is devoted chiefly to a very brief discussion of certain changes needed in the South Dakota tax laws. The commission is recommending the introduction of a county assessor system, and the repeal of legislation enacted in 1919 providing for the partial exemption of certain forms of property.

As we run over these reports we are impressed anew with the desirability of securing some measure of standardization in the form and the contents of the reports from different states. The first steps in this direction were taken at the Minneapolis Conference, in the provision for a committee on standardized tax reports.

We are moved also to suggest that every state tax commission should have, as one of the most important branches of its organization, a research bureau, which shall be engaged in studying intensively and scientifically the operation of the state's tax system. This means more money spent by the commission, and it will therefore be opposed immediately by those who look simply at the low budget of a state tax commission as the chief test of its usefulness. One reason for the barrenness of so many of the reports is the fact that the tax commissions are not provided with the facilities for making the kind of study of their own problems that would make interesting reading for their own citizens or for others interested. An active research division, engaged under proper direction in finding out just how the various taxes used by any state were operating, how much their administration was costing, how their burden was being distributed, would justify itself many times over from the standpoint of cost alone, to say nothing of the improvement which could thereby be effected in the tax system itself.

DECISIONS AND RULINGS

EDITED BY A. E. HOLCOMB

Income, Federal — Reorganizations with Exchange of Shares—No Profit Realized. — The federal circuit court of appeals has rendered an important decision, which is apparently in direct conflict with rulings of the treasury department on the question of income, in the case of reorganizations, under the Revenue Act of 1916.

The decision may be well described by quoting a paragraph in it which clearly states the question decided, as follows:

"The question to be decided resolves itself, therefore, to this: Is there taxable income to the stockholder in the receipt of shares of greater face value and actually worth more than the cost to him of old shares for which they are exchanged upon the occasion of a reorganization accomplished by the taking down of an old corporate structure and the setting up in its place of a new one with the same powers under the laws of the same state, but having greater capital stock, with a taking over of assets subject to liabilities and a continuance of the business under the same management and name?"

The court held that in such a case no taxable income was shown, which will be recognized as contrary to the department's rulings. (See Income Tax Rulings, C. B. I—1, p. 18; Sol. Op. 131). It held that there was a continuance of the same concern and that the change in the corporate entity was not a change in substance as was the case in *United States* v. *Phellis* and *Rockefeller* v. *United States,* 257 U. S. 156, 176; there was no segregation or distribution of surplus and no formation of a new corporation to accomplish such segregation or distribution; the venture of the stockholder in the hazard of the business continued undivided. He had not drawn out his profit. His investment was still entirely in the same enterprise although represented by new certificates which were yet essentially the same.—*Weiss, Collector,* v. *Stearn; Same* v. *White,* U. S. C. C. A., 6th Circ., Jan. 9, 1923.

Excess Profits, Federal — Computation of Tax under Act of 1917. — The question, now moot, as to the interpretation of that section of the excess profits tax act of 1917, containing the rates for the computation of the tax, has just reached the United States Supreme Court, that court holding that the ingenious interpretation of the treasury department "follows the clear language of the act," adding the observation that "as the language of the act is clear, there is no room for the argument of plaintiff drawn from other revenue measures."

The question, it will be remembered, was whether the net income to be spread through the brackets was the entire net income or the taxable net income. If the language in question is "clear", it is difficult for the annotator to imagine what language would be obscure in the connection in which this is used. It would seem proper to measure income taxes by taxable income. — *Greenport Basin & Const. Co.* v. *United States,* U. S. Sup. Ct., Jan. 2, 1923. See *Bul.* VI, 224.

Federal Taxes — Relief by Injunction. — In refusing to enjoin the collection of certain taxes levied under the national prohibition act the federal circuit court of appeals held that the suit could not be maintained until the taxpayer had unsuccessfully appealed to the commissioner of internal revenue for a refund of the tax, and that a previous conviction under the prohibition act for unlawfully having liquor in possession was no defense to an assessment of the tax for manufacturing such liquor, since this did not constitute a double punishment for the same offense.—*Violette* v. *Walsh,* 282 Fed. 582. (See *Bul.* VII, 85, for decision below.)

Federal Procedure — Abatement of Action through Change of Taxing Officers.—The validity of the New York income tax, as applied to foreign corporations, was involved in the decision by the federal district court in this case which was noted in *Bulletin* VII, at p. 228. An appeal was taken to the United States Supreme Court and upon a motion to sub-

stitute parties appellees, that court has ordered a rule to show cause why the case should not be dismissed as to the state comptroller who was in office at the time the appeal was taken but who has since been superseded. The court refers to its opinion in *Irwin* v. *Wright,* 258 U. S. 219; *Bul.* VII, 228, in which the need of federal legislation to prevent dismissal in such a case was expressed, and to *United States* v. *Butterworth,* 169 U. S. 600. — *Gorham Mfg. Co.* v. *Wendell et al.,* U. S. Sup. Ct., Jan. 2, 1923.

Inheritance, Federal—Computation of Tax when Residuary Estate All Bequeathed to Charitable Purposes.—In her will Mrs. Russell Sage, after making certain specific charitable and non-charitable bequests, some of the latter to be paid without deduction for legacy or inheritance taxes, provided that the residuary estate should all go to charitable organizations, all of which were of such a character as to be allowed as a deduction in reaching the net estate taxable.

The New York law, under which the estate was probated, was held in *Matter of Hamlin,* 226 N. Y. 407, to make the federal estate tax payable out of the whole estate, which in effect casts it upon the residuary estate. (See *Bul.* V, 60.)

The executors claimed that the net estate was the gross estate after making the deductions specified in the act, including the charitable bequests. The federal authorities claimed that the deduction should be diminished by the amount of the estate tax assessed, which they ascertained by a complicated algebraic formula. Their reasoning was that there could be no residuary estate until paramount charges were paid. Therefore the true residuary was a sum, after payment of this tax, which must therefore go to increase the net estate.

The court referred to the use of algebra, to compute a tax which could not be ascertained by arithmetic, observing that the presumption was that Congress intended a simpler method—"one that a plain man could understand"—and observed further that the net estate resulting from the legal invention of using a tax to measure a tax did not respond to the historical concept of the meaning of a "net estate"; that it was artificial, not real, and was to be avoided, if at all possible.

While admitting that the New York rule did diminish, in favor of the United States, what the charities received, the court observed that it was wrong for the federal authorities to use a rule of incidence, of state creation, to increase the federal exactions.

Being of the opinion, therefore, that the scheme of taxation insisted on by the Government was unjust, opposed to long established practice and the spirit of the statute and not required by its language, the court affirmed the judgment below, and upheld the contentions of the taxpayer.—*Edwards* v. *Slocum et al.,* U. S. C. C. A., 2d Circuit, Jan. 8, 1923.

Income, State — Income from Sale of Lease Not from Intangible Property.—Under the Massachusetts classified income tax law, gains from dealings in intangible personal property are placed in one of the classes and taxed at the rate applicable to the class. A taxpayer who had been taxed on the amount received upon an assignment of a lease of real estate contended that no tax was payable, since the transaction did not involve the transfer of intangible personal property. The question for the court was therefore whether a lease of real estate was such property.

The court held that, considering all property as either real or personal, apart from statute, a lease of land was in that general sense personal property, referring to the universal rule that in case of death it went to the executors and not to the heirs at law.

It held, however, that a lease of real estate was a peculiar kind of personal property, that it had been designated as a chattel real; that the statutory definition of real estate, as including "all rights [to lands] and interests therein" was broad enough to comprehend leases and that similar words were to be found in the statute of frauds. But it found that other laws were so phrased as not to include leases as real estate, for instance, those concerning attachment; that while possible, it was in a considerable degree unnatural to hold a "chattel real", which in some aspects was treated not even as personal property, to be intangible personal property; that if the purpose had been to make such income subject to tax, it would seem probable that

some definite description would have been employed.

These considerations led the court to hold that the income in question was not derived from the purchase and sale of intangible personal property, as those words were used in the statute and refund of the tax paid thereon was ordered.—*Moulton* v. *Long*, 137 N. E. 297.

Inheritance, State — Penalty Tax on Property Not Taxed in Decedent's Lifetime. — The United States Supreme Court has affirmed the judgment of the Connecticut court, upholding the validity of the unique statute of that state, intended to induce payment of taxes by a decedent during life, by imposing a special tax upon property found in his estate, upon which property taxes have not been so paid, for five years preceding death.

The state court, dealing with the constitutional objection that the act was a taking of property without due process of law, rejected such claim, asserting that it rested upon the unfounded premise that the property passed to the distributees, subject to just debts; that the right to dispose of property by will or to have it disposed of by law, after death, was created by statute, and therefore the state could impose such conditions upon its exercise as it might determine.

The Supreme Court characterized this holding as "so authoritative as to hardly need comment," observing that attack upon it rested upon a confusion of rights; that the property passed to representatives, not absolutely, but subject to liabilities and burdens upon it while in the hands of the deceased and that distributees' or creditors' interests were subject to the same burden; that the burden which the state imposed upon the devolution of the property in this case was in the nature of a penalty for a delinquency of the decedent, which was made to survive by statutory sanction.

These principles were claimed inapplicable because there was no debt owed by decedent and no action under the statute arose against her nor had penalty accrued while living, the statute being then inapplicable; that the primary object of the law was punishment, not revenue.

The court held these assertions unjustified; that there was an evasion of duty by decedent and the obligation was legally imposed upon her estate; that the payment of taxes was "an obvious and insistent duty".

The court rejected objections based upon the claim that the tax in question was more than the property taxes would have been had the decedent paid them during her lifetime, holding that this effect was but a way of fixing a penalty, which was a matter of state legislative discretion.

The final contention that the statute could only be sustained on the assumption that "in the last analysis, the property of deceased persons belongs to the state," the court characterized as extreme, observing that the power of taxation was complete and all-inclusive and that it was a proper exercise of it to satisfy out of his estate the delinquencies of a property owner; that it was so complete that the assumption of universal ownership by the state was not needed for its justification. — *Bankers Trust Company et al.* v. *Blodgett*, U. S. Sup. Ct., Jan. 22, 1923. See *Bul.* VII, 59.

Income, State — Nature of Income Tax—Corporation as Person—Mississippi Law Sustained. — The Mississippi income tax, which received fresh impetus from the decision of the state court, sustaining its validity and its application to corporations, which were held to be "persons", again gains, from the dismissal of the appeal by the United States Supreme Court, for want of jurisdiction.

The opinion of the state court will be remembered as particularly interesting, for its able discussion of the essential nature of an income ax. as an excise tax and not a tax on specific property, and of its characteristics as a personal tax.

The fatal shortcomings of the law which seriously impair its yield are referred to in the note of the decision in *Bulletin* for June 1921, p. 281. — *Hattiesburg Grocery Co.* v. *Robertson*, U. S. Sup. Ct., Jan. 22, 1923.

Income, State — Fees of Committee of the Person of an Incompetent as Deductions. — The New York court rejected the claim as a deduction, in computing the net income of an incompetent, of fees paid to the committee of the person.

The deduction was claimed as an ordinary and necessary expense in carrying on the business of the management of the

affairs of the incompetent, which in this case consisted of attending to the care and management of an elaborate household provided for her comfort.

It was urged that the salary of the committee was as much of an expense of administration of the estate as were the items of expense of the committee of the property of the incompetent which had been allowed as a deduction. As to this, the court observed that it was not necessary to pass upon that deduction and decide whether the committee of the property was "carrying on any trade or business", in handling the property, a question which it says was not conclusively determined in *People ex rel. Kernochan* v. *Wendell*, 198 App. Div. 197; *Bul.* VII, 91.

This case the court found quite different, in that here the expense had to do with the "personal living and family expenses" of the incompetent, which expressly excluded the idea of "business" and were thus within the clear language of the section prohibiting such deductions.

The court assumed the case of a wealthy resident, mentally competent to manage his affairs, but physically unable to do so, observing that in such a case the salary of a manager employed to administer everything relating to his personal comforts in and about his home, including the directing of servants, etc., could not be urged as a deduction, as an expense of carrying on a business.

Seeing no distinction between the assumed case and the case at bar, the rejection of the expense as a deduction was confirmed. — *People ex rel. Kernochan* v. *State Tax Commission*, N. Y. Sup. Ct., App. Div., 3rd Dep., Jan. 10, 1923.

Equality and Uniformity.—The full meaning and effect of the decisions of the United States Supreme Court, rendered in recent years, in which relief has been given one taxpayer whose property, though perhaps not assessed on the statutory basis of "full value", was yet assessed substantially higher than other property in general in the locality, are illustrated by the latest expression of the court in a case of this character.

The taxpayer in question was a bridge company, whose property in Nebraska was assessed at a sum which it deemed too high. It appealed to the county board, which increased the assessment. Appeal was taken to the district court, which found that the reasonable value was more than the assessment. Testimony was introduced, showing by records of sales, that farm property in the county was assessed at 55.70 per cent of its value and city property at 49.29 per cent of its selling value, and that these bases of assessment had continued for seven years. The district court made no finding on this issue and did not refer to it. Appeal was taken to the Nebraska supreme court, which found from the evidence that the assessment of $700,000, as the true value, was not so manifestly wrong that it was justified in disturbing it.

On the question of undervaluation of other property, the court held that the settled rule in the state was that the taxpayer's remedy was to have the undervalued property raised, rather than to have its property when assessed at true reduced, citing *Lincoln Telephone Co.* v. *Johnson County*, 102 Neb. 254; 166 N. W. 705; *Bul.* III, 208, and expressing its unwillingness to recede from the rule of that case.

The court referred to the "uniform rule" provision of the Nebraska constitution; to the statute requiring valuation at "actual value" and to the clearly defined position taken by it, as expressed in *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 350, 352, 353 (*Bul.* IV, 28), and similar cases, from which it observed that "it must be regarded as settled that intentional, systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property."

The Chief Justice referred to the dilemma presented in such a case and to the conflict of view by the courts as to what should be done. He referred to his own language in the opinion in *Taylor* v. *L. & N. R. Co.*, 88 Fed. 350, 364, 365, written when sitting in the Circuit Court of Appeals, which has been so often quoted and which is so expressive of the province of a court of equity in such a "dilemma", and observed that it had been approved and incorporated in the decision in *Greene* v. *L. & I. R. R. Co.*, 244 U. S. 499, 516, 517, 518.

The conclusion from these authorities was stated to be that "such a result as that reached by the Supreme Court of Ne-

braska is to deny the injured taxpayer any remedy at all, because it is utterly impossible for him, by any judicial proceeding, to secure an increase in the assessment of the great mass of underassessed property in the taxing district" and that "In substance and effect the decision of the Nebraska Supreme Court in this case upholds the violation of the Fourteenth Amendment, to the injury of the bridge company."

The court held that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed, even though this is a departure from the requirement of statute, as the requirement of uniformity "is to be preferred, as the just and ultimate purpose of the law." The judgment of the state court was reversed.—*Sioux City Bridge Co.* v. *Dakota County, Nebraska,* U. S. Sup. Ct., Jan. 2, 1923. See *Bul.* VII, 24.

Equality and Uniformity — Railroads — Valuation of Subsidiary Company. — The distinction drawn by the United States Supreme Court between a case where it will afford relief from alleged unequal and discriminatory assessment and where it will not do so, is well illustrated by comparing the decision in the bridge company case, above noted, with the cases now to be discussed, decided the same day.

In these cases five railroad companies operating in North Carolina appealed from a decree of the district court denying an application for an interlocutory injunction to prevent the taxing officials from collecting advalorem and franchise taxes imposed for the year 1921. The appeals were based upon the claim of violation of equal protection, due process and commerce clauses of the Federal Constitution, the uniformity provision of the state constitution and the statutory method of valuation.

The cases arose by reason of the action of the state, taken under its revaluation act of 1919, pursuant to which the valuation of railroad property was doubled and that of real estate quadrupled. These assessments, when approved by the legislature, were to be the bases of taxation for the years 1920 to 1923 inclusive. Such approval was given by an act of the legislature in 1920 and, in that year the railroad taxes were lower than had before prevailed and were duly paid. Owing to severe depression in business, widespread objection arose to continuing the revaluations, and as a result the legislature of 1921 made provision for review of the real estate valuations by local boards of review and for deductions in cases of over-valuation. The same act provided for review of railroad assessments by the state board. Under this act reductions of real estate generally were made in 67 counties, varying from 1 to 50 per cent, while in 33 counties no reductions were allowed. Applications by the five railroads in question were rejected, except as to one road, which was granted a partial reduction, whereupon these suits were begun.

The claim of unconstitutionality in the assessments rested mainly upon a charge of discrimination and inequality arising through the reviewing process above noted. The court reasserted the principle that equity would require relief in cases of discrimination arising from under-assessment of other property, citing among other cases, its decision in the bridge case, but observed that such relief would not be available in the absence of a showing of intentional and systematic under-valuation of such other property, which it found to be clearly not shown in these cases, but that strong evidence to the contrary was shown by the fact that no reductions in real property were made in 33 counties and that the reductions in the other countries ranged from 1 to 50 per cent.

This is the significant point in these cases and the key to the distinction above referred to; that a court of equity will not interfere with a state's exercise of its taxing powers where there is evidence of a real attempt to make a just and equal assessment of all property, even though it may be shown that such attempt has not resulted in equality and that some property has suffered discrimination. The decision in *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 350, seems to furnish the fundamental basis by which the probable attitude of the court is to be tested.

The claim of further injustice by reason of the franchise tax was held equally unfounded, as its basis, which was the valuation of the property for advalorem taxes, was held not to make it a property tax and no constitutional objecton arose under the commerce clause nor from the fact that

this was an additional tax to the advalorem tax.

An interesting point appears to have arisen in the case of one railroad which was a subsidiary of another. Its valuation had been arrived at by an apportionment of a total valuation placed upon the parent corporation. The court observed that while a doubt was raised as to the validity of this action, the objection to its validity could be reviewed upon final hearing.

The decrees in each case denying an injunction were affirmed.—*Southern Railway Co.* v. *Watts,* U. S. Sup. Ct., Jan. 2, 1923.

Reassessment — Time Limit in Wisconsin.—A Wisconsin taxpayer sought to enjoin the reassessment of property in a town, ordered by the state tax commission, after a hearing. The jurisdiction of the commission was questioned, it being alleged that it had no authority to order a reassessment after a lapse of two years, and that the issuance of such an order was an abuse of discretion. Under the statutes the commission was given discretionary power to order reassessments and no time limit was fixed within which it was required to act. The court refused to enjoin the reassessment, holding that the commission acted within its jurisdiction, and that it would not interfere with its proceedings unless it appeared that its acts were so unreasonable or arbitrary as to indicate a total lack of judgment or discretion.—*Knause* v. *Rollof,* 190 N. W. 463.

Assessment — Oil Lands — Net Income as Factor. — A California assessor in fixing the assessment of certain oil lands, estimated the net income derived from their total oil and gas production for the preceding year, and capitalized the same at 10%. To the result he added a nominal amount for the surface value of the land and a certain amount for the structural value of the wells, and reduced the total to a 40% basis. The assessment was resisted as arbitrary and unequal, but was sustained, the court holding that the assessor did not adopt such a method of valuation as was out of relation to the factors which ordinarily enter into a fair consideration of the value of such property and that the assessment was not discriminatory and unjust, when compared with other similar property.—*Birch* v. *Orange County,* 210 Pac. 57.

Assessment — Unimproved Lands—Speculative Value.—In assessing certain unimproved lands located in a Washington municipality, the assessors took into consideration the use to which such lands might be put by way of plotting them and selling them as small tracts at large prices. The assessors claimed that the dominant value of the lands was that based upon the use to which they were capable of being devoted. The court held that under the statutes, land was required to be assessed at its fair market value at the time of the making of the assessment, which did not mean that the assessor could place a value upon it which was purely speculative, and that while there might be a possibility of great value in the indefinite future, the weight of the evidence indicated that the present value was one-quarter of that found by the assessor. — *Finch* v. *Grays Harbor County,* 209 Pac. 833.

Public Utility Valuation—Capitalization of Net Earnings.—The Louisiana court sustained an assessment of the franchise of a public utility company by the state board, in the absence of clear and convincing proof that it was erroneous. In disposing of the various contentions of the company with respect to the capitalization of net earnings, which was used as the basis of the assessment, the court held that a proper deduction from gross earnings, for maintenance and depreciation, should be allowed; that a reasonable return should be allowed upon the tangible property, which should be taken at its assessed value; that interest paid on borrowed money invested in the plant might not be deducted in ascertaining the net earnings, since the company was entitled to a fair return on the plant in which such borrowed money was invested; and that no additional value for a so-called "primary franchise" might be added.—*Lake Charles Ry. Light-Water Works Co.* v. *Reid,* 93 So. 743.

Expenses of Operation—Federal Income Taxes as Expenses. — There has been a tendency in the past, on the part of public service commissions and, in some instances of courts, to refuse to recognize the federal income tax as an expense of the corporation, in reaching net income for the purpose of considering the reasonableness of service rates. It is difficult to discover the basis for this tendency, as it was

never very definitely discussed. Certainly this tax is an obligation of the corporation, which must be paid by it out of income before any distribution of profits may be made.

The expressions of the United States Supreme Court on the subject in *Galveston Elec. Co.* v. *Galveston,* U. S. S. C., Apr. 10, 1922; *Bul.* VII, 260, while somewhat involved and puzzling, seemed nevertheless to fairly dispose of the matter, but this has evidently not been admitted by some of the commissions.

The Ohio Public Utilities Commission in passing upon a schedule of rates for telephone service in an Ohio city rejected the federal income tax as an expense, and this rejection constituted the main point in the appeal to the supreme court of the state. In that court the sole authority cited by counsel for the commission was the Galveston decision, which was also relied upon by the complaining company, as authority for allowance of the federal income tax as an operating expense.

The court observed that it was "apparent that, in its main feature, the Justice [Brandeis] clearly indicated that a federal income tax is a proper deduction from gross revenues in calculating a fair return," and added "we are unable to see why it [the federal income tax] does not impose as effective a burden upon business as local taxes," citing the decision of the United States District Court in *Home Tel. & Tel. Co.* v. *Pub. Utilities Com. of Indiana,* 1922 B. P. U. Rep. 4791, where the master's report holding the federal income tax to be a proper item of operating expense was approved. It referred also to a view of the Galveston case holding similar to its own, taken by the New York and Idaho commissions. No reference is made to the similar view of the United States District Court for the Southern District of New York, noted in *Bul.* VIII, 14.

Construing the Galveston decision as favoring the inclusion of the federal income tax as an operating expense, the court reversed the order of the commission, with instructions to include that tax as part of the expenses of operation, which should be deducted from the gross income in making up a net return available for interest and dividends. — *Ohio Bell Tel. Co.* v. *Pub. Util. Com. of Ohio,* Ohio Supreme Ct., Dec. 26, 1922.

Banks—United States Securities.—A recent *per curiam* decision of the United States Supreme Court affirmed the Oklahoma court in sustaining an assessment of bank shares, made without deduction of United States securities owned by the bank. This conclusion was rested upon the authority of the *Van Allen* v. *Assessors,* 3 Wall. 573, and *Bank* v. *Commonwealth,* 9 Wall. 353, 359.

The doctrine that in assessing bank shares, assets of the bank, which might be exempt if assessed directly, may be considered in reaching the total value of the capital stock and surplus, is of course well settled and universally followed, but for some inexplicable reason the press reports of this decision carried the notion that the court had announced a new doctrine as to the taxation of federal securities. These reports evidently became so widespread that the court issued a statement to the press, intended to correct the misinterpretation which had been placed upon its decision. This statement carried the report that tax commissioner Hallanan of West Virginia had ordered assessors to assess all United States Government bonds for state, county and municipal taxation.

Mr. Hallanan expressed great surprise upon learning of this, and issued a statement to the press denying that any such instructions had been issued; that the doctrine of the decision had long been followed in assessing bank shares in West Virginia, and that as a matter of fact West Virginia had "beat the supreme court to it by several years".

This "comedy of errors" doubtless arose from the attempt of some thoughtless reporter to register a "beat", without the facts to sustain him.—*People's Nat. Bk. of Kingfisher Okla.* v. *Board of Equalization of Kingfisher County,* U. S. Sup. Ct., Nov. 20, 1922, Opinion per curiam. See *Bul.* VI, 185.

Bank Shares—Deduction of Exempt Assets. — Under the Georgia statutes the shares of banks are taxable to the stockholders in the counties where the banks are located, and the banks are required to return the shares for taxation and pay the taxes thereon. A state bank resisted the tax upon its shares, claiming that the value of liberty bonds and of certain federal treasury certificates, which were exempt

from taxation, were included in fixing the assessment. The court held that the tax on the shares of a bank was not a tax on the bank's capital but upon shares owned by the stockholders, as their individual property; that such shares constituted liabilities of the corporation, and not its assets, and that it was no longer an open question that shareholders of a bank were subject to tax on their shares although the entire capital of the bank might be invested in exempt securities. — *Daniel* v. *Bank of Clayton County,* 114 S. E. 210.

DOING BUSINESS — INTERSTATE COMMERCE—SALES BY AGENT.—A foreign corporation engaged in the business of financing automobile dealers by purchasing notes taken by them in time sales, established a resident agent in Michigan. This agent supplied the dealers with application forms and conditional sale blanks, to be executed by the purchasers of automobiles on the installment plan, and forwarded them when executed to the home office without the state, for approval. He also obtained the financial statements of automobile purchasers, which were forwarded to the home office for approval. Upon the approval of an application, the home office mailed the check for the necessary amount to the agent, who delivered the same to the dealer. Payments upon the notes, when due, were required to be made to the home office, but in some instances payments were made directly to the agent. The court held that the company was transacting such a substantial part of its ordinary business within the state, as required it to obtain a certificate of authority; that the contracts were clearly made within the state; that the transactions were not interstate commerce, since no interstate agency was employed, and that money was not commerce but merely a medium of exchange.—*Republic Acceptance Corporation* v. *Bennett,* 189 N. W. 901.

INTERSTATE COMMERCE.—A shipment of pig iron to a place in Michigan from a place without the state, by a foreign corporation which had a resident agent, pursuant to a contract executed by such agent within the state, was held to be interstate commerce. — *Toledo Furnace Co.* v. *Lansing Co.,* 189 N. W. 864.

"MERCANTILE" CORPORATION—ADVERTISING CORPORATION. — A New York corporation purchased advertising space in numerous publications, and allowed its clients, upon payment of commissions, to use such space. It retained absolute control over such space at all times. In resisting an assessment of its personal property by a municipality, the corporation claimed that it was a mercantile corporation, subject to be taxed by the state upon its net income, and was therefore exempt from local taxation upon its personal property. The court upheld the assessment on the ground that the company was not a "mercantile corporation", holding that the term embraced the buying and selling of goods and commodities, which included advertising space, but as it did not appear that the company actually bought and sold advertising space, it could not find that it was a mercantile corporation.—*Peo. ex rel. Morse International Agency* v. *Cantor,* 196 N. Y. Supp. 514.

PUBLIC PURPOSE — APPROPRIATION FOR FARM BUREAU.—A Kentucky statute providing for the organization of county farm bureaus to advance agriculture in the state, and appropriating a sum double the amount of the annual dues collected from the members of such a bureau, was upheld. Membership was restricted to citizens of the county owning or operating a farm, and no salaries to officers or dividends were permitted to be paid. The act was attacked on constitutional grounds, as being a grant of an exclusive privilege not for a public use and authorizing the levy of taxes not for public purposes, and as imposing taxes for county or other municipal purposes without conferring upon the proper local authorities, by general laws, the power to assess and collect such taxes. The court held that the act in question was for a general public purpose and not for a local purpose, hence it was not necessary that the power to assess and collect the sums appropriated be delegated to the local authorities. — *Hendrickson* v. *Taylor County Farm Bureau,* 244 S. W. 82.

TAXES AS DEBTS. — The Washington court, in interpreting the meaning of "indebtedness" or "debt" in a contract, held that while the technical definition of "debt" did not cover taxes, under the

modern use of that term and the spirit of the contract under consideration, such term included taxes, which it held were an indebtedness of the corporation.—*Dingle* v. *Camp*, 209 Pac. 853.

Federal Agency—Exemptions.—The United States Spruce Production Corporation is a corporation organized under the laws of Washington, under powers conferred by Congress, to expedite the production of airplanes for war purposes. Its shares are all owned by the United States, and it holds title to property, including a railroad, acquired and built at government cost, but has never been engaged in commercial business or the business of a common carrier and all its activities since the close of the war have been with a view of the winding up of its business. Held, that its railroad or other property is not subject to taxation by the state.—*U. S.* v. *Clallam County, Wash.*, 283 Fed. 645.

Federal Agency—Exemptions.—Shipyard property of the United States Shipping Board Emergency Fleet Corporation, purchased by the corporation, pursuant to and with funds appropriated by the act of Nov. 4, 1918, are exempt from taxation by the state, in view of the act of June 5, 1920, even though the legal title was in the corporation—a private corporation—since the government caused the corporation to be formed, held all of its stocks, furnished all of its capital, and owned the entire beneficial interest in its property. — *King County, Wash.*, v. *U. S. Shipping Board Emergency Fleet Corporation*, 282 Fed. 950.

Relief and Review—Refund Claim—Federal Stamp Tax. — The taxpayer, a railroad corporation, took certain conveyances from its subsidiary corporations, for the sole purpose of enabling it to mortgage the property conveyed, no valuable consideration passing. At the time of the transaction, in 1915, the deeds were exhibited to the commissioner of internal revenue and a ruling was asked as to the necessity of affixing stamps. The commissioner ruled that the act applied and the stamps were affixed without protest. Four years later, the commissioner, in construing the similar act of 1918, held that where no valuable consideration passed, stamps were not required on conveyances. The taxpayer thereupon filed claim for refund, which was rejected, because barred by the two-year statute of limitations. It then brought suit in the United States court of claims, alleging that its original request for a ruling was in effect a petition for abatement and that its claim for refund was an amendment thereof. The demurrer of the government was sustained and the United States Supreme Court affirmed this judgment, holding that the court of claims could not have done otherwise than sustain the demurrer. — *B. & O. R. R. Co.* v. *United States*, U. S. Sup. Ct., Jan. 2, 1923. See *Bul.* VII, 84.

Relief and Review—Assessor's Judgment Final.—In appealing from a judgment of a lower court fixing the assessment of certain lands, an Arkansas taxpayer alleged that the assessment was against the weight of evidence. The supreme court held that it would not disturb the findings of a trial court upon disputed issues of fact unless it found such findings to be unsupported by substantial testimony.—*Gibson* v. *Laurence County*, 244 S. W. 341.

Relief and Review—Injunctive Relief.—An Alabama taxpayer sought to restrain the tax officials from making a seizure of his property for unpaid taxes, alleging that the records upon which the seizure was based were not legally effective substitutions for the original records, which had been lost, and that the true amount of the taxes constituting a lien upon his property was unobtainable therefrom. The court refused to grant the relief requested, holding that a sale of the property under seizure could not take place without notice and hearing, and decree of the probate court, at which time the taxpayer could present his claims and have an adjudication thereon, which was an adequate remedy at law.—*Bailey* v. *Folsom*, 93 So. 479.

Licenses—Motor Vehicles.—An Alabama board of county commissioners, pursuant to the provisions of the general statutes, enacted an ordinance levying a license tax for road purposes on commercial vehicles. The tax was attacked as a delegation of legislative power to the board of assessors, in violation of the constitutional provision, and as discriminatory,

because vehicles used for private purposes were not taxed. The court refused to enjoin the enforcement of the tax, holding that as the power of the legislature to regulate the subject of taxation was unlimited, it might delegate the power to impose license taxes such as those in question, and that there was no discrimination in the exemption of vehicles used for private purposes, since the legislature might create reasonable classes upon which the taxing power might be exercised.—*Hill* v. *Moody*, 93 So. 422.

Special Assessments — Estoppel to Contest Assessment through Using the Facility. — The United States Supreme Court affirmed a decree of the Missouri court holding that where a landowner connected his premises with a sewer he was estopped from denying the legality of an assessment to cover its cost, on grounds involving federal questions, the state court having found as a fact that the evidence supported its ruling on the question of estoppel.—*St. Louis Mall. Casting Co. v. Prendergast Const. Co.*, U. S. Sup. Ct., Jan. 2, 1923.

Levy — Limitations in Oklahoma.— Under the Oklahoma statutes an annual advalorem tax may be levied upon all taxable property in the state, sufficient, with income from other sources, to pay the expenses of the state government. The board of equalization is required to compute the amount of the total levy, to which must be added 20% as an allowance for delinquent taxes and from such total the estimated income from other sources must be deducted. The total levy may not exceed the amount appropriated by the legislature for the expenses of the state. In computing the 1921 state tax, the board ascertained the amount of the levy in the statutory manner and added thereto an amount estimated to be sufficient to meet any deficiency in the appropriation, due to increased costs arising subsequent thereto. Taxpayers brought proceedings to enjoin the collection of the state tax, claiming that the entire levy was invalid, because unnecessary and arbitrary and because the board had no authority to include in the levy the estimated deficiency. The court enjoined the collection of the tax, holding that the levy was unnecessary and arbitrary since the law clearly contemplated that the board should consider the surplus in the state treasury when determining the amount of the levy. It also held that the deficiency in appropriation might not be included in the levy, since the levy was limited by the statute to the amount of the legislative appropriation, and this was not cured by the subsequent action of the legislature in making an emergency appropriation, because the constitution required deficiency appropriations to be included in the levy for the succeeding year; that the additional 20% item for delinquent taxes was not required, as there was no necessity for a levy therefor; and that while a hardship might be inflicted upon taxpayers who had paid their taxes, if the tax was invalid, this was no ground for upholding the tax, since that condition was caused by the board itself, by its disregard of the law.

The court, pursuant to the statutes, exercised original jurisdiction in this case, which was questioned, on the ground that the court was one of last resort and that the power to exercise original jurisdiction might not be granted to it. It was held that the constitutional provision defining the powers of the court, and authorizing it to exercise such other and further jurisdiction as might be conferred upon it by law, was sufficient to authorize the legislature to confer original jurisdiction upon it, to such a limited extent as would not interfere with its primary purpose as a court of last resort, by appeal, and that matters of public interest directly affecting the sovereign rights of the state, such as its tax levy, were of such importance as to justify the conferring of original jurisdiction with respect to such matters.—*El Reno Wholesale Grocery Co.* v. *Taylor*, 209 Pac. 749.

REVIEWS

Knauth, Oswald W. "The Distribution of Incomes by States in 1919." New York; Harcourt, Brace and Company; 1922; pp. 30.

This study is a by-product of the volumes on incomes in the United States which have already been published by the National Bureau of Economic Research. In our comments on the statistics of income in the November *Bulletin* (p. 35) we suggested the desirability of an intensive study of the facts relative to the distribution of wealth and incomes which are now buried in the federal income tax returns. The staff of the National Bureau of Economic Research has been at work for some time in this general field, and the publication under review is Volume III of their studies. The present study is somewhat sketchy and is based very largely upon materials which were assembled in the course of preparing the first two volumes of the series. These materials are handled according to methods which are described in the earlier publications. The results are of decided interest and value since we have in them an estimate of the total income received by the citizens of each state, with some attempt to indicate a distribution of this income to certain groups, such as farmers, farm laborers and non-agricultural persons. The amount received in each state as corporate surplus is also estimated.

This work is of the greatest interest and its value as the pioneer undertaking in the field of analysis of the facts relating to the national income can hardly be overestimated. No one realizes better than those engaged in this work, however, that it is merely a beginning. It is to be hoped that the opportunity may come to the highly qualified staff of the Bureau to extend their investigations in this field until we have for each state an estimate of the range of different classes of incomes and an estimate of the income from various sources within each state.

Jeter, John W. A. "Assessment and Taxation in Shreveport and Caddo Parish—a Manual of Information for the Property Owner and Taxpayer."

This little pamphlet has been issued by Mr. Jeter for the benefit of his constituents. It contains some very interesting comments with regard to the work of the parish assessor in Louisiana; the causes for the increases in taxes, and a brief statement of the receipts and expenditures of the various municipalities in the parish. The assessment procedure and the leading features of the Louisiana tax laws are summarized in brief and popular fashion for the benefit of the lay leader. Mr. Jeter has been very successful also in combining something of the spice of life with the dry facts of tax legislation and administration. This is an admirable combination and certainly the extreme dryness of taxation for the general reader justifies such attempts to popularize the subject. If we may judge from the evidence of this little pamphlet, the assessment of property in Shreveport and Caddo Parish is well done and the people are satisfied with the results.

Kixmiller and Baer. United States Income and War Tax Guide, based on Revenue Act of 1921 and 1922 Regulations. Commerce Clearing House, New York and Chicago, 1923.

The appearance of a new batch of adminstrative rulings serves as a sufficient excuse for the annual revision of the multitude of federal income tax guides and manuals. Under the circumstances this is perhaps a burden which authors and public must bear cheerfully since it seems necessary, but which they may deplore on account of its weight. This manual has the merit of being less expansive than the average, and of being written in clear and simple language. It appears to be based entirely on the law and the 1922 Regulations, and takes no account of judicial interpretation or of circulars and other methods by which changes in interpretation are registered. Some interesting illustrative material is included.

H. L. L.

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OF THE

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A. E. HOLCOMB, CONSULTING EDITOR

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FIFTEENTH ANNUAL CONFERENCE

The Executive Committee has at last decided on the place and the time for the next Annual Conference. The place is the Greenbrier Hotel, at White Sulphur Springs, West Virginia; and the time is the week of September 24th. White Sulphur Springs is on the main line of the Chesapeake and Ohio Railroad, nine hours from Washington, and easliy reached through New York, Richmond, Louisville, Cincinnati, St. Louis, and Chicago. The hotel selected is splendidly equipped for such a gathering.

It now remains for all members to unite in an effort to make the fifteenth Conference a success. All members who attended the Conference at Bretton Woods will recall how delightful it was to meet in an environment of mountains and forests, far from the jostle and turmoil of the city.

The Secretary will be pleased to receive suggestions concerning the program and other matters pertaining to the Conference. It is unfortunate that the Association cannot accept all of the invitations so kindly tendered it, and it is to be hoped that we may in time get around the circle of these hospitable friends.

MEMBERSHIP NOTES

We are very glad to report that Mr. Mark Graves has just been appointed to the Tax Commission of New York. Mr. Graves was formerly Income Tax Director and was later in charge of Governor Miller's program for securing economy in administration.

Commissioner of Revenue A. D. Watts of North Carolina has resigned. R. A. Doughton has been appointed his successor.

Prof. R. M. Haig of Columbia University addressed a session of the National Education Association in Cleveland, upholding the principle of the model report and condemning the Ohio tax system.

PROCEEDINGS OF THE FOURTEENTH CONFERENCE

The Secretary announces the completion of the distribution of the Proceedings of the Minneapolis Conference.

THE BANK TAX SITUATION

Under the provisions of H. R. 11939, which became a law March 4, 1923, upon the signature of the President, section 5219 of the U. S. Revised Statutes was amended to read as follows:

(PUBLIC LAW, NO. 518, 67TH CONGRESS)

(H. R. 11939)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 5219 of the Revised Statutes of the United States be, and the same is hereby, amended so as to read as follows:

"SEC. 5219. The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may tax said shares, or include dividends derived therefrom in the taxable income of an owner or holder thereof, or tax the income of such associations, provided the following conditions are complied with:

"(1) (a) The imposition by said State of any one of the above three forms of taxation shall be in lieu of the others.

"(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided,* That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

"(c) In case of a tax on the net income of an association, the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon the net income of mercantile, manufacturing, and business corporations doing business within its limits.

"(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

"2. The shares or the net income as above provided of any national banking association owned by nonresidents of any State, or the dividends on such shares owned by such nonresidents, shall be taxed in the taxing district where the association is located and not elsewhere; and such associations shall make return of such income and pay the tax thereon as agent of such nonresident shareholders.

"3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

"4. The provisions of section 5219 of the Revised Statutes of the United States as heretofore in force shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section."

This section is the sole authority for the taxation of national banks by the states, and owing to the decision in the Richmond case, its amendment has, as is well known, been a matter of deep concern on the part of the state taxing officials. Our former president, Samuel Lord, of Minnesota, has, at great personal sacrifice and with consummate patience and perseverance, devoted a vast amount of time in Washington and elsewhere, in an effort to protect the rights of the states. The final result, while doubtless disappointing to him, must yet be pronounced a distinct accomplishment, in that the states are protected vastly more than seemed possible in the early stages of the campaign and they will be able to proceed under their existing laws, without the serious changes which the amending bills in their early forms would have caused. A deep debt of gratitude is due Mr. Lord for his indefatigable labors on behalf of the states and of taxpayers in general.

With the passage of the amendment, its interpretation becomes a matter for serious consideration, and it is to be hoped that the committee of the tax officials will be able to issue an authoritative announcement of their views as to such interpretation to the end that legislation and administration may proceed along similar

lines in the several states and that the extreme disadvantages of diverse rulings and conflicting legislation may be avoided Having this in view, we have been led to make some observations, designed to encourage discussion and consideration of the effect of the amendment upon state taxation of banks.

Under the permissive statute as amended, there is now open to the states, instead of a single method of taxing national banks—to wit, by a tax on the shares—a choice of one of three methods. They may tax the shares, or tax the dividends from the shares under an income tax or they may tax the income of the bank. There are, however, conditions and limitations, affecting the application of each of these methods, which must be obeyed.

If the first method—tax on the shares—is selected, the tax must not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens "coming into competition with the business of national banks." The words quoted are new, otherwise the limitation is the same as has heretofore existed and received interpretation, through numerous decisions. The latest decision, and the one which led to the amendment of the statute, virtually held that mortgages and loans in the hands of private individuals were "moneyed capital" and that if such property was taxed less than national bank shares, the tax upon such shares was thereby rendered unlawful. Evidently to remove the effect of this decision, a provision appears in the amended section declaring that "bonds, notes, or other evidences of indebtedness in the hands of individual citizens, not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital" within the meaning of the section.

The limitation under discussion, therefore, appears to require that the burden of the tax upon the bank shares shall not exceed that assessed upon "moneyed capital" (other than personal investments, of the character excluded from the comparison), employed in competition with the business of national banks and owned by individual citizens.

It is to be noted particularly that the comparative tax upon other moneyed capital must be one actually assessed, and assessed against individual citizens, and that the moneyed capital must be of a kind that comes into competition with the business of the banks. These tests seem only to be applicable to a tax imposed upon private bankers and not to be applicable to a tax assessed upon a corporation, even though it be engaged in the business of banking or in the investment business. This raises the question of whether state banks may not be taxed as corporations, their shares not being taxed in the hands of the holders, without regard to any comparison with the tax in question on the shares of national banks, and hence without any effect upon the tax upon such shares. Likewise an incorporated private banking or investment business would seem not to be within the comparable class. In each case, no tax would be "assessed" upon "individual citizens" with respect to moneyed capital, even though such capital was employed in competition with the business of national banks. This curious result was obviously not intended, but it is difficult to perceive why it does not follow from the language used.

States selecting this method would appear to be able, without affecting their tax upon national bank shares, to include in one classification all intangibles owned by corporations and all intangibles owned by individual citizens, which do not come into competition with the business of national banks. Such intangibles would include shares of stock of corporations, other than shares in state banks, trust companies, investment companies (possibly), and would of course include the "personal investments" specifically described as not constituting "moneyed capital".

In another classification such states would be able to include national bank shares, the capital of private bankers and possibly unincorporated investment houses. They could either include in this classification shares of state banks or trust companies or omit them and place a tax on such corporations, exempting their shares.

The above conclusions are made without regard to the provisions of state constitutions and solely with reference to powers under the federal statute in question, as interpreted by federal decisions.

If the second method — income tax on dividends — is selected, the limitation is

that the tax shall not be at a greater rate than is assessed upon the net income derived from other moneyed capital. Moneyed capital would doubtless be construed to include the classes of intangibles held such under the section as it stood before the amendment, except as modified by the clause dealing with "personal investments," noted above. Income from such investments is excluded from the comparison.

This method is open to but few states, and where permissible it would hardly seem to furnish a sufficiently permanent source of revenue to induce its use.

If the third method—tax on the net income of the bank—is used, the limitation is that the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed upon the net income of mercantile, manufacturing and business corporations doing business in the state.

It is to be noted that here the basis of comparison is the tax rate, whereas in the first and second methods the expression is that the tax shall not be at a greater rate than, etc. This is the language of the section before amendment, and it will be recalled that it has been interpreted as referring to the burden of the tax imposed, taking all pertinent factors into consideration. The difference is an important one in practical application. Here, it is solely a question of the nominal rate used, which rate must not be greater than that imposed upon the net income of financial corporations, with the further proviso that it shall not be higher than the rate upon the net income of corporations, other than financial corporations.

The difficulty of meeting this test would appear to prevent its use. Corporations, other than national banks, are commonly taxed upon a substantial portion of their property, and the income tax is used as a wholly supplemental tax, as a franchise tax, or as a tax in lieu of a tax on some portion of the property. There is no power to tax the property of the national bank, which is commonly many times the value of the share stock, so that a reasonable rate upon the net income of the bank, as a sole tax, would be entirely unreasonable, if imposed upon a business corporation, also taxed upon its property or subjected to one or more of the assortment of franchise, privilege, license, capital stock or other taxes, commonly imposed.

As the matter stands, therefore, it would appear that the property tax states are likely to retain the old general property tax upon national bank shares and upon other property or classify such shares as above indicated. Income tax states will hardly adopt either of the income taxes permitted, but will retain the property tax on national bank shares, classifying them in the manner permitted.

A. E. H.

GROWTH IN LOCAL TAX BURDENS

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In a country which extends over a large territory and whose density of population is relatively low, local finance is bound to occupy a more prominent place than in one in which the opposite conditions prevail. General overhead expenditures for education, sanitation, health, etc. do not in all probability increase so rapidly as population. In a community, say, of a population of one thousand, a schoolhouse may be constructed which will provide educational facilities for the younger generation of these inhabitants; should the population increase to three thousand, four thousand, or five thousand, it may still not be necessary to construct a new building. It is true that the number of instructors will have to increase with the number of pupils, but the overhead involved in maintaining the schoolhouse and in defraying the annual debt charges will be more or less constant over a series of years. In this country taxation of dispersing authorities other than that of federal government has probably been higher than in any other country. In the fiscal year 1913-1914, the

tax burden imposed by local taxing authorities in this country amounted to $1591 per capita, compared with $13.35 in Germany, $9.77 in United Kingdom, $5.12 in France, $4.04 in Italy, and $1.92 in Japan. Aside from the explanation offered above, it should be remembered that government ownership has been more extensively practised in European countries than in the United States, with highly satisfactory results in no few cases; hence, local governments have been forced to call upon their citizens to meet current expenditures to a less extent than would otherwise have been the case. The comparatively large tax burden borne by German citizens before the War to meet local government expenditures, despite the intensive development of government-owned enterprises, is perhaps traceable to the vast social policies upon which these authorities embarked and for which Germany was noted before the War. The following table furnishes the details for the year 1913-1914:

reduced to the absolute minimum of existence. All classes of citizens were called upon to make sacrifices of every kind and description and the minor civil divisions of government were also requested to fall in line.

It is only after the War that we find these stored-up demands let loose with a volume and fury that is unprecedented in recent fiscal history. This movement is one confined not only to this country, but is visible practically everywhere. Local taxing authorities have been increasing their impositions at such a rate as to render conditions acute. In some foreign countries and to a limited extent in the United States, this state of affairs is traceable to social burdens which have been assumed as an outgrowth of the War. Soldiers' bonuses, relief measures for unemployed and incapacitated veterans of the War, attempts at raising the standards of living for government employees which had been reduced during the course of the War, etc., account in part for this increase in local taxation. Also public undertakings which, in normal times, were highly lucrative, have in the majority of cases become a drain on the public treasuries, and greater and greater deficits are resulting. More particularly in this country, however, is the mercurial increase in the construction of public roads and buildings.

TABLE I

Distribution of Total Tax Burdens, 1913–1914 *

	National Government		All other taxing authorities		Total	
	Amount	Per Capita	Amount	Per Capita	Amount	Per Capita
	(millions)		(millions)		(millions)	
United Kingdom	$799	$17.34	$451	$9.77	$1,250	$27.11
United States	682	7.02	1,547	15.91	2,229	22.93
France	680	17.17	204	5.12	884	22.29
Germany	403	5.95	905	13.35	1,308	19.30
Italy	289	8.12	144	4.04	433	12.16
Japan	198	3.69	103	1.92	301	5.61

* Fiscal year ending in 1914, except in the case of France, for which the calendar year 1913 is taken. Official data were used throughout with the exception of those of local taxation for Italy and Germany where estimates were interpolated by the writer on the basis of official figures of a related character.

As soon as the War broke out the sphere of local government activities was greatly circumscribed and local government expenditures were subjected to severe curtailment. It is evident that at a time when national governments were engaged in a battle of life or death, it was imperative that the excess of the nations' production over consumption of past or current origin be mobilized for the use of the national taxing authorities and that encroachment thereon by other authorities be

Let us examine some of the outstanding figures in connection with local finance in this country today. According to the

United States Census Bureau, the total gross bonded indebtedness of states, counties, cities, towns, villages, school districts, etc., aggregated $4,281 millions in the fiscal year 1912-1913. From the beginning of 1913 to the end of October, 1922, there have been issued $6,519 millions of long term securities on behalf of these authorities and also $4,169 millions of short-term securities. If we assume that the latter issues, which run for a year or less, are either repaid or are converted into long-term issues at maturity, and if allowance is made for refunding and repayments, it will be found that the gross bonded indebtedness of state and local governments, exclusive of the federal government, has increased by $5,200 millions, or approximately 120 per cent over the pre-war figure. Thus the combined gross bonded debt of state and local governments exceeds at the present time $9,400 millions. In view of the long maturities which attach to state and municipal issues, it is apparent that the annual charges on their indebtedness have thus been enhanced to the extent of $450 millions, inclusive of sums for amortization. In other words, the contributions from every man, woman and child in this country for the support of state and local governments will for the next two or three decades be $4 per annum larger than heretofore by virtue of the total increase in public indebtedness. During the post-armistice period, each year has witnessed cumulatively larger and larger issues of state and local government securities, and the problem is becoming more and more acute with the lapse of time.

A recent survey has indicated that of the total debt of state governments outstanding early in 1922 ($1,072 million), virtually one-half was incurred since our participation in the World War in April, 1917 and over one-third was contracted since the beginning of 1920. Construction of highways and bridges accounted for $368 million, waterways and harbor improvements were responsible for $214 million, and payment of soldiers' bonuses represented $130 million.[1] The latter figure does not, however, give an accurate picture of the cost of state bonuses to taxpayers. While the bulk of the money involved in this wholesale largess has been raised through bonds and notes, it should be remembered that four states defrayed such expenditures directly by taxation and one state (Massachusetts) borrowed only for a short period. Up to November 15, 1922, about $180 millions of bonus securities have been sold, and it is reliably estimated that this amount plus the authorized but yet unsold issues will cost the 23 states that have passed upon the measure a total of $350 millions for this purpose only.[2]

That this country has spent enormous sums on road building is apparent from a study of developments year by year. From 1910 to 1921, both inclusive, expenditures for construction of roads have aggregated $2,526 million. In 1921 alone, this item was placed at $600 million, defrayed as follows: federal aid, 14 per cent; state road bonds, 7 per cent; state taxes, 12 per cent; county, township and district taxes and assessments, 14 per cent; and motor vehicle revenue, 19 per cent. Figures for recent years are here appended, in so far as data are available:

TOTAL CASH EXPENDITURES ON PUBLIC ROADS[3]

Year	*Amount (millions)*
1904	$ 59.5
1914	240.2
1916	272.6
1917	279.9
1918	286.1
1919	389.4
1921	600.0

Along with the growth of bonded indebtedness there has been a continued increase in tax burdens for the support of local governments which has assumed alarming proportions. In Pennsylvania, the total amount of taxes levied by country and local governments has grown from $99 millions in 1912 to $145 millions in 1919, $170 millions in 1920, $198 millions in 1921, and $235 millions in 1922. In New York, the total of general property taxes levied by local governments has grown from $214 millions in 1912 to $315 millions in 1919, $347 millions in 1920, and $407 millions in 1921. In California, the growth has been from $65 millions in 1912

[1] *The Bank of America, Survey of State Debts*, New York, 1922.

[2] *The Bond Buyer*, Nov. 25, 1922, p. 6.

[3] *Statistical Abstract of the United States*, 1921, p. 353, and *The Bond Buyer* (New York), July 29, 1922, p. 3.

to $97 millions in 1919, $120 millions in 1920, and $158 millions in 1921. In Massachusetts local tax levies have more than doubled from 1912 to 1921. For 34 states reporting figures for 1912 to 1921, the increase in local government taxes has been 78 per cent from 1912 to 1919, 22 per cent in 1920 over 1919, and 12 per cent in 1921 over 1920. Examination of 1922 figures for a limited number of states indicates that there has been no material cessation in this movement.

In the following table the growth of general property tax levies of local governments is indicated for recent years:

TABLE II

General Property Tax Levies of Local Governments (millions)

	1912	1919	1920	1921
Arizona	$ 3.9	$ 8.5	$ 11.2	$ 11.3
California	65.3	96.7	120.2	157.8
Colorado	15.0	28.0	33.8	.....
Connecticut	16.3	37.0	.....	.....
District of Columbia	1.0	8.8	9.4	12.5
Florida	4.4	10.1	11.4	12.5
Idaho	5.9	13.5	17.3	18.1
Illinois	84.6	173.4	196.5	.....
Indiana	39.1	60.0	64.8	103.5
Iowa	33.6	71.5	87.9	94.2
Kansas	24.4	49.5	62.5	67.4
Kentucky	5.3	10.4	12.6	14.8
Louisiana	9.3	23.7	31.1	32.4
Maine	7.1	11.7	15.9	17.2
Maryland	13.5	21.9	31.2	33.6
Massachusetts	68.3	105.3	128.1	138.6
Michigan	37.7	93.3	123.0	137.9
Minnesota	32.6	78.2	99.1	99.2
Missouri	26.7	44.2	50.9	.....
Montana	8.9	21.0	24.0	25.1
Nevada	1.6	2.9	3.5	3.8
New Hampshire	5.3	10.2	10.5	12.6
New Jersey	39.0	75.1	95.2	107.6
New Mexico	2.4	7.0	.....	.....
New York	214.0	315.2	346.8	406.5
North Carolina	6.1	16.9	.....	.....
North Dakota	9.9	24.4	27.0	26.7
Ohio	69.6	141.1	200.0	210.6
Oregon	16.1	22.6	28.2	31.5
Pennsylvania	99.3	145.2	169.8	197.8
Rhode Island	7.4	12.4	16.0	16.7
South Carolina	3.5	8.4	12.4	12.8
South Dakota	9.3	23.7	31.4	29.7
Tennessee	6.1	12.1	15.8	17.6
Texas	10.9	22.4	24.5	.....
Utah	5.0	9.7	13.6	14.1
Vermont	3.7	5.3	7.3	8.0
Washington	25.3	49.5	55.0	50.8
West Virginia	9.9	26.6	32.2	34.8
Wisconsin	31.0	70.0	88.4	89.4
Wyoming	1.7	4.6	5.5	7.2

Summary of Table II

States reporting figures, 1912-1921:	
Number	34
Increase, 1919 over 1912	78.0%
Increase, 1920 over 1919	22.1%
Increase, 1921 over 1920	12.3%
Increase, 1921 over 1912	144.2%
States reporting figures, 1912-1920:	
Number	38
Increase, 1919 over 1912	80.3%
Increase, 1920 over 1919	21.0%
Increase, 1921 over 1912	118.2%
States reporting figures, 1912-1919:	
Number	41
Increase, 1919 over 1912	82.1%

While the receipts from federal taxation have been declining, the increase in taxes levied by states and local governments have grown so rapidly as to more than counterbalance this amelioration, and the result has been that the nation's tax bill is today larger in terms of dollars than heretofore. In 1903 the total tax bill mounted

to $1,382 million or 6.7 per cent of the national income; in 1913 the total taxes paid by citizens of this country had risen to $2,194 million, but national income had grown more rapidly, with the result that taxes represented only 6.4 per cent of the national income. This is a phenomenon that was plainly visible in the century preceding the outbreak of the War. The tendency had been for productivity and national income to grow more rapidly than the requirements for the support of government. The War interfered very seriously with this tendency. In 1919 we find the total tax bill standing at $8,034 million, which represented 12.1 per cent of that year's national income; in 1921 we find, however, that while the total taxes had risen to $8,363 million, the diminution in the national income was so appreciable that the burden of taxation represented more than one-sixth of the national income. While state and local government taxes represented 69.5 per cent of total taxation in 1913, this proportion had fallen off to 36.9 per cent in 1919 and increased to 47 per cent in 1921.

A perusal of the facts presented above raises the query whether the policy that is being pursued is a wise one. This enormous expansion in local governmental expenditures cannot continue much longer without permanently impairing our national economy. Energetic action is called for with a view of placing the damper on public profligacy and reducing the outgo to proportions that are more in line with the industrial and general economic status of the community at large. While the particular objects for which disbursements are being made are on the whole nothing short of useful and laudable, it is nevertheless clear that we are over-extending ourselves and that we are bound soon to create such deplorable conditions as exist in the State of Arizona, where special assessments for roads in many cases have exceeded the assessed values of the properties affected and where communities have virtually been converted into armed camps to resist collectors as a result of a system of extortionate and unreasonable taxation. The time is propitious for a careful examination of the whole question with a view of securing the cooperation of public bodies in lowering the tax burden, increasing governmental efficiency and enhancing public welfare.

TAX PROBLEMS IN MICHIGAN*

TAXATION OF INTANGIBLE PROPERTY

The system employed by the state in the taxation of this class of property is most unsatisfactory from the standpoint of either justice and equity or the amount of revenue derived. Certain forms of this class of property are subject to advalorem taxation; on other forms a nominal specific tax is imposed, and certain other forms are exempt from taxation entirely. There should at least be some approach to uniformity in the taxation of such property, and it should be made to contribute in revenue to the state and local governments a fair and just proportion of the total revenue required to conduct the affairs of government. We do not mean by that, that this class of property can be reached so as to contribute taxes on an advalorem basis of valuation; wherever this has been tried it has met with utter failure, because to impose an advalorem tax would mean the confiscation of the larger part of the income derived from it. It is easy to conceal such property from the tax assessor and it always will be concealed if an attempt is made to levy a tax sufficiently high as to amount to confiscation of the income derived therefrom. In order to reach it successfully and have it bear its reasonable proportion of tax levies it is essential and necessary that the rate of tax applied be reasonable. Only in this way can we hope to bring about a satisfactory method of reaching such property for taxation purposes. The rate of tax should be a specific one, low enough to make it certain that such property, now being concealed, will be uncovered voluntarily by the owner thereof and placed upon the tax rolls. If this is done the state and local governments will receive much more revenue than they now receive from this class

* Extracts from the Report of the Michigan Committee of Inquiry into Taxation, 1923.

of property, the tax will be much more equitably distributed and, consequently, the levy of real property should be reduced accordingly. In other words, the more revenue derived from intangible property the less will, or should be, levied upon real property.

How to reach this class of property for purposes of taxation has been one of the greatest problems in all the states. Some states have tried to reach it by levying a tax upon the income from such property, while others have imposed a small specific tax thereon. Where the income has been taxed the property has been exempted from other forms of taxation. While the income tax method is an improvement over the advalorem tax method, it has not produced the results expected of it, especially where the rates imposed on large incomes have been high. In those states where they have imposed a nominal specific rate of tax they seem to have had the most pronounced success. For instance, in the state of Maryland they impose a tax of thirty cents on each hundred dollars of certain intangible property for local government purposes and a further levy of fifteen cents for state government purposes. This law has been in effect since 1897. The year following, under operation of the new law, the amount of such property placed upon the tax rolls increased from six million dollars to thirty-nine million dollars, and last year the aggregate amount had risen to two hundred sixty-six million dollars, and the rate of tax imposed produced a very tidy sum of revenue to the state and local governments. The experience in Maryland has been the experience of other states where a reasonable specific tax has been levied upon this class of property, notably the states of Pennsylvania and Minnesota. In both of these states this method of taxing intangibles has been in force for many years and the people seem to be quite well satisfied with it. *We believe that if a similar system of taxing intangibles was employed in Michigan it would be a great improvement over what we have now. There would be many more people paying taxes who ought to pay them, and there surely would be a considerable increase in amount of revenue received.*

EXEMPTION OF SECURITIES

In the matter of taxation there should be no privileged classes created under our system of government. Be it said, however, that the recent tendencies of our legislative bodies have been to create privileged classes by way of the exemption from taxation of investments in governmental and other securities. The constantly increasing amount of wealth that is being invested in this class of property has become a very serious economic problem. It results in the diversion of an enormous amount of money from productive enterprises, tends to increase interest rates, creates social unrest in that there is a growing prejudice against the capitalist who makes heavy investments in nontaxable securities. It is fast drying up what should be a productive source of revenue and thereby throws an unequal burden of taxation upon industry, the farm and the home. It results oftentimes in the exemption from taxation of fortunes obtained by devise or inheritance, while on the other hand those who through their personal exertions have built up a large industry producing something of real benefit to the community are called upon to pay on the value of the industry and its products more than a full measure of taxes. It encourages the growth of governmental indebtedness and is an incentive to extravagance in public expenditures. It violates all principles of economic justice in taxation and makes equality in taxation an impossibility. This system of tax exemption is being condemned by every authority on taxation in the country. It is vicious in principle and has been carried on to such an extent that it has become a menace to our institutions of government.

It is, indeed, your committee thinks, a poor system of government that offers such refuge from taxation to the more wealthy class of citizens.

As a matter of fact, by the enactment of unwise legislation we have been, unwittingly perhaps, creating a state of tax-dodgers and your committee believes that it is high time to call a halt. It costs money to maintain state and local governments, to build and maintain public highways, conduct our judicial system, provide proper school facilities, maintain penal and charitable institutions, protect the life and property of our citizens, pave and light public streets, safeguard public health, and to provide ample municipal sanitation. The

cost of these things must be borne by the people who are benefited by them. The owners of bonds and other securities receive as much benefit from these provisions of government as do the cottage owner, the farmer, the manufacturer, the merchant and the owners of other taxable property. It seems to your committee, therefore, that it is bordering on an economic crime to say to the owners of such securities: "You need not contribute anything toward the expense of the government that protects your investments and your lives."

Under our present system of taxation a man who invests $50,000 in six per cent bonds running for a period of ten years would receive a total income therefrom of $30,000. The total amount of tax he is required to pay on his investment is only $250, equivalent to an annual rate of one-twentieth of one per cent, and an amount equivalent to only one-twelfth of one per cent of the annual income from his investment. Surely the purpose of the law permitting so insignificant a levy must have been exemption and not taxation.

While it is impossible to estimate with a degree of accuracy the total amount of such property wholly or partially escaping taxation in our state because of the facility with which it is concealed, we have investigated the matter to such an extent that we do not hesitate to say that there is an enormous amount of such property escaping taxation entirely and also an enormous amount that pays only a nominal tax and, therefore, is practically exempt from taxation. One of the worse features of this exemption of this class of intangible property is that it is usually owned by those who can best afford to contribute towards the support of government; and therefore its exemption cannot be defended from any standpoint, economic or otherwise.

It will be of public interest to give a brief history of the laws exempting this class of property from taxation. In 1919 the law was enacted exempting from taxation bonds issued by Michigan municipalities. In 1911 the law was enacted exempting mortgage credits from further taxation upon payment of a registration tax equal to one-half of one per cent of their face value. In 1913 an act was passed by the legislature providing that, upon payment of a tax similar to that paid on mortgage credits, bonds, notes or debts secured by mortgages on real estate recorded in any state or country other than Michigan, these constituting foreign securities, should thereafter be exempt from all other forms of taxation. This was followed in 1915 and in 1917 by amendments to the law adding thereto bonds or other obligations issued by any state, foreign country, or by any county, township, city, village, school district, good roads district, or other governmental subdivision located outside of this state, so that upon payment of the tax of one-half of one per cent such foreign securities are by law made exempt from further taxation in Michigan.

This, your committee thinks, is an economic wrong. It has cost the taxpayers of Michigan many million dollars in that they have had shifted to their shoulders the proportion of taxes that should, by all that is just, be borne by the holders of such securities. Furthermore, a large portion of the huge sum of money invested in such foreign securities has gone out of the state where it cannot possibly be of any benefit to the people of Michigan, notwithstanding that the greater portion of it was earned in Michigan through the operation of Michigan enterprises.

After a close study of this subject of tax-exempt securities and the effect of their exemption upon the general welfare of our state, we strongly recommend that the laws providing for their exemption be immediately repealed and that laws be enacted imposing specific taxes thereon at the following rates: On securities issued by our state and local governments and on mortgage credits, an annual specific tax of thirty cents on each hundred dollars; on foreign securities, an annual specific tax of fifty cents on each hundred dollars. The imposition of these rates upon this class of property will not, in our opinion, work injury to any interests involved. The rates proposed are reasonable and no citizen having a sense of duty toward his government will raise objection.

We know it is claimed as an objection to the taxation of municipal securities that in effect it results in taking money out of one pocket and putting it into another and that it tends to make it more difficult to market such securities. While we appreciate there is some ground for these claims, we do not hesitate to say that, from a community

standpoint the benefits derived from their exemption are not nearly sufficient to balance the injury their exemption causes to the taxable interests of our state. Furthermore, when the laws were enacted exempting foreign securities from further taxation upon payment of the specific tax of one-half of one per cent of their face value, the principal object for which Michigan municipal securities were exempted from taxation was practically nullified in that bonds issued by many of the western states and municpalities pay a much larger rate of interest than do Michigan securities, and therefore have been more attractive to Michigan investors. It is pertinent to say that from our investigations we are convinced that the great mass of our people are in favor of, and are demanding, the placing of this class of property upon our assessment rolls for a reasonable contribution toward the support of our state and local governments. Certain it is that if this class of property had been required to pay a rate of tax such as we herein propose, the real property of our state would have been relieved of many millions of dollars of the disproportionate share of the tax burden it has borne these many years. The amount of revenue received from the taxation of mortgage credits would have been more than doubled and in the case of securities the percentage of increase would have been much greater. Furthermore, there would have been a much nearer approach to equal taxation.

STOCK OF FOREIGN CORPORATIONS

Under our laws stock of foreign corporations held by citizens of Michigan is subject to advalorem taxation, while the stock of domestic corporations is exempt from taxation because their property, being located in Michigan, is taxed on an advalorem basis of valuation the same as other property, and to tax the capital stock in addition to the property would mean double taxation, and therefore would be illegal. It so happens that there are many large foreign corporations whose property is largely within the state of Michigan. This property is subject to advalorem taxation and, being foreign corporations, their stock can also be assessed at its full value. It will be seen that this, in effect, is double taxation although its assessment is a legal exercise of the authority of the state over subjects of taxation. The result has been that such stock has been generally concealed from the assessing officers and only a small part of it has ever appeared upon the assessment rolls of the state. *We have no doubt that if a reasonable tax was imposed upon this class of property the owners would voluntarily disclose their holdings for taxation. We, therefore, recommend that shares of stock in foreign corporations be subjected to an annual specific tax of forty cents on each hundred dollars of their value.* We believe that if this change is made in the method of taxing this class of property it will result in producing much more revenue than is now obtained from it.

LIMITATION OF TAX RATES

Among the many proposals submitted to the committee is one to limit tax rates, this being urged mostly by the State Real Estate Association. After careful consideration we have come to the conclusion that a limitation of tax rates will not of itself result in what its proponents claim—a lessening of, or check on, public expenditures. Limitation of rates would really be an incentive to increasing the bonded debt of the state and its local political subdivisions and also to cover assessments of property. That has been the experience wherever a limitation of rates has been resorted to, and a costly experience. If any limitation at all is wise, then it should be by way of placing a maximum on the budget. In other words, on the amount of money that can be raised in any year for the support of government. This plan is, in effect, that the increase in taxes levied in any year should not exceed a certain per cent of the amount of taxes levied the preceding year, provision being made for a further increase to meet emergencies, at the discretion of some state authority. It will be seen that under this plan one political subdivision, having conducted its government economically and desiring to provide needed public improvements the next year, might be seriously handicapped by lack of sufficient funds and thus would be penalized for its conservation of public expenditures the previous year. Furthermore, such a plan lacks sufficient flexibility to meet the many emergencies that often arise and thus would be brought about

endless controversies, appeals and attempts to bring about remedial legislation.

Instead of a limitation of tax rates or levies, a budget system, proper accounting and the election and appointment of efficient men and women to public offices are the proper road to efficiency and economy in the conduct of public business. The people now have ample machinery with which to bring about economy in the conduct of government if they will only use it.

In this connection we suggest that the State Tax Commission, or the Department of Taxation, be required to collect annually from all political subdivisions of the state statistics relative to tax levies, public expenditures and debt. These statistics should be tabulated in such form as to show the increase or decrease in the amount of taxes levied and in expenditures, and then published for information of the public.

REPORT OF THE LEGISLATIVE TAX COMMITTEE OF IOWA

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I. Tax Reform

At the present time, taxation is perhaps the most discussed and least understood of the many important economic problems in Iowa. Certain facts are of course well known to every taxpayer. He knows how much direct property tax he must pay in March and September. In a general way, he knows also that taxes are for the support of public schools, the construction and maintenance of roads and bridges, and other obvious public purposes. Every time he pays his direct property taxes he is inclined to think out loud, blame the school board, county board of supervisors, or certain other public officials, and complain of government waste, extravagance and inefficiency.

The Thirty-ninth General Assembly, by joint resolution, authorized the appointment of four senators and four representatives, the same to constitute a Legislative Tax Committee clothed with authority to investigate the problems of taxation in this and other states, and to make a report, including a draft of bills for acts to amend and revise the system of taxation in Iowa. This committee has been studying the question for nearly two years, during which time hearings have been granted to almost every class of taxpayers—in fact, to every one who expressed a desire to be heard. The writer served this committee in an advisory capacity, and is therefore familiar with the facts, arguments, and conditions which have been responsible for their recommendations. These recommendations, which for the most part deal with problems of tax administration and budget procedure, may be of interest to students of public finance in other states. Before presenting the fundamental changes in the tax system of Iowa which have been suggested, however, a few general observations should be made regarding the distribution of our present tax burden, the increase of the tax burden, and the causes of said increase.

The distribution of the present tax burden may be considered from at least three points of view; first, local as contrasted with state taxes; second, the relative amount of taxes required to provide for the different functions of government; and third, the amount of taxes levied against real estate as compared with certain intangible forms of property, trades, professions, etc.

During the fiscal year that closed June 30, 1922, approximately one-tenth of the property tax of Iowa was used by the state and slightly over nine-tenths for various local purposes. This means that, relatively speaking, the taxes levied by school boards, township trustees, city councils, and the county boards of supervisors, were more than nine times as important as the tax levy authorized by the last General Assembly. If there is waste, extravagance, and inefficiency, therefore, in the expenditure of public funds, the remedy, for the most part, is close to home in the localities.

In the second place, almost exactly one-half of our present state and local taxes is

being expended for education, which includes the three higher state institutions of learning. Slightly more than twenty-five per cent of the taxes paid by farmers, on an average, is expended for the construction and maintenance of roads and bridges, said percentage being much less, however, if town and city taxes are included. The major part of the balance is absorbed by various municipal levies. The support of township, county, municipal, and state government, including the courts—meaning the officials necessary to carry on these various departments of government — requires only a very small per cent of our state and local taxes.

There is a very general tendency to over-estimate the relative weight of the state tax burden; and also to over-estimate the relative amount of taxes required to provide for certain officials, boards, and commissions. A state appropriation of $1,000,000 means a tax levy of approximately one mill, or a tax of $3.50 on the average quarter section of Iowa land, the taxable value of which is about $3,500. At the beginning of the recent economic depression, thousands of Iowa farmers signed petitions for additional road work which cost many times this amount, when much of this work could have been postponed, and should have been postponed until higher prices are received for farm products. Many people complain of the small sum of money appropriated for the use of the farm bureau by the county board of supervisors. On an average, throughout the state, this appropriation amounts to one dollar for each quarter-section of Iowa land. Members of the farm bureau, who own a quarter-section of land, pay six dollars for the benefit of this organization; one dollar in taxes and five dollars in the form of an annual due. Farmers who own the same amount of land, and are not members of the farm bureau, receive all of the numerous economic benefits of this organization, and pay only one dollar in taxes for its support. If it is worth six dollars to some farmers, it is certainly worth one dollar to their neighbors.

The third standpoint of tax distribution is the relative tax burden levied against real estate as compared with other classes of property. This is a more important and complex problem than that outlined above. In a general way, we know that all real estate is listed and heavily taxed; and that much intangible property is not listed and therefore pays no taxes. The same is true of certain classes of income. More than this we cannot say until the detailed facts are known. One of the most important reasons back of the committee's recommendation for a county assessor and state board of assessment and review is to secure data necessary to a just equalization of the tax burden between real estate and other classes of taxable property and taxable income.

Land in city, town, or county cannot be concealed. It does not escape assessment. The township assessor has no difficulty in locating and listing land for purposes of taxation. Building improvements are also easily located; but in many cases the valuation of this class of property is a more difficult problem. When we pass to certain forms of corporate property, difficulties and complexities at once accumulate. The local township assessor is at sea without a compass. Many forms of taxable income have little or no connection with tangible property, and can be made to bear their just share of the public burdens only through income or business taxes. The simple economic truth is that many intangible forms of property, and more complex forms of business do not follow township, town, or city lines, and therefore cannot be located and valued even by the most capable and efficient township assessor. It requires thorough state supervision of county assessment to perform this class of work.

Take one illustration of what we have in mind. At present, about $700,000,000 of moneys and credits is being listed for taxation in Iowa. The flat rate being five mills, the tax obtained from this class of property is about $3,500,000. It is generally assumed by well-informed persons that not half of our moneys and credits is being listed on account of the present faulty system of assessment. This means an annual loss of at least $3,000,000, possibly more. In the judgment of the writer, the recommendations of the committee, if enacted into law, will add hundreds of millions of dollars in various forms of property to the assessment roll, that, in the past, have not contributed to the public burden. In short, real estate, being visible and readily located, is now bearing more

than its just relative share of the public burden, and will no doubt continue to do so until county assessment with adequate state supervision is substituted for the present township plan. This, at least, has been the general experience of other states which have replaced obsolete methods of assessment by a modern system.

State and local taxes have increased about threefold during the last ten years as contrasted with an increase of about double that relative amount in the federal tax burden during the same period. In the case of federal taxes the primary cause was the World War. Let us examine briefly, however, the general causes of a large increase in all taxation, national, state, and local, an increase which began many years prior to the World War.

In the first place, taxes have tended to increase because people demand that town, city, county, state, and nation undertake new functions from time to time. Every one is familiar with this fact. Most of us are guilty without being conscious of our guilt in this connection. It is perhaps the price we pay for progress, or what is generally called progress. At one time a new tax levy is demanded for comfort stations, at another time a tax levy is provided for social centers. The Iowa Code dealing with cities and towns is literally filled with amendments, added from time to time, the purport of which is to make possible the levy of additional taxes for new purposes. Many people demand economy in one breath, and in the next, vote additional taxes for what is assumed to be a real need. All of us favor economy in general, but most of us do not favor economy in particular cases, which is the important consideration.

Again, everyone is familiar with the fact that taxes have increased because people demand that functions which are already undertaken by the state, be performed in a more efficient and therefore a much more expensive manner. Bucket brigades, the smoked lantern, corrugated culverts, board sidewalks, wooden bridges, and fifteen per cent road grades, mostly mud, have already passed, or are rapidly passing to their reward. They were worthy pioneer institutions like the prairie schooner, and the present system of township assessment. We now have modern fire protection, well lighted streets, cement sidewalks, a more permanent type of road and bridges, and more efficient public schools. These things are what most of us think of as progress. At any rate these improvements are responsible for the larger part of our rapid increase in taxation. We can greatly reduce our taxes by going back to the pioneer school, the pioneer road and bridge, and the pioneer system of light, fire and police protection. People can change back to the old system if a majority desire to do so.

Perhaps the most outstanding and fundamental proposal for changing the present Iowa tax system is the Legislative Tax Committee's recommendation that township, town, and city assessors, and township, town, and city review boards be abolished; and that, in lieu thereof, the assessment of property be placed in the hands of appointed county assessors and their deputies, the county board of review, being clothed, at the same time, with authority to equalize individual assessments. This means that the county, and not the township, town or city, will be the unit of assessment, and also the unit for the review and equalization of assessments. The reasons for this proposal are stated in the Report, as follows:

1. The work of assessment of property must be in the hands of permanent officials giving their entire time to this important, necessary and difficult function of government. This means in essentially rural territory that the county should be the unit of assessment, for a rural township or even a small city cannot afford to employ and would not have permanent work for an official of this character. We now have one county treasurer with deputies, and the plan works well. Why not have a county assessor?

2. The county assessor should be appointed and not elected. Legislative officials like members of the General Assembly, county boards of supervisors, city and town councils, boards of township trustees, school boards, etc., should for obvious reasons be elected by the people. They pass laws, general rules, ordinances and impose taxes. The duties of the county assessor, however, are purely administrative, not legislative, in character. He should be appointed, not elected, for the good reason that we can secure and retain a higher type of service in this way. If proof is needed to sustain so self-evident a fact, proof would be useless. The general recognition of this point in view is the fruit of a slow educational process; which is the only sure way to gradually overcome fear, suspicion, prejudice and selfishness.

3. The county assessor should be removable from office by the state board of assessment and review. A fair trial should be provided and no assessor should be removed from office for per-

forming his duty. He should be removed only for failure to perform his duties as required by law. Without this authority vested in the state board, discipline is impossible, and a high type of efficient service cannot be developed.

4. The county assessor should be under the constant, efficient and sympathetic supervision of the state board, receiving uniform blanks, books, schedules, etc., from the said state board, and carrying out faithfully the instructions of the same. This supervision should include the power of the state board to require the county assessor to reassess all or any part or class of the property of a given district or of the county, if in their judgment the same has not been assessed in a relatively uniform manner as provided by law. The assessment of property and collection of property taxes in Iowa is a $100,000,000.00 business annually, about $1,000,000.00 for each county. Unless there is a head to this business in each county, working under the supervision of a real state head, the result will be in the future the same as in the past—waste and inefficiency.

5. The so-called home rule or local self-government argument is always used against the plan of substituting county for township assessors. The most effective reply to this contention is that with improved roads and motor vehicles the county is just as small a unit of local government as the township was twenty years ago. In fact, a farmer can now get to the county-seat in less time than he could travel to a distant point in his township with a horse and buggy, not to speak of a lumber wagon, only a few years ago. The terms home rule and local self-government apply to the county at the present time quite as much as to the township and, as already explained, the county is the smallest unit of local government which can afford to retain a county assessor as a permanent official.

6. The charge is also made that the appointive system is arbitrary, autocratic, and undemocratic in character, not in keeping with the spirit of republican institutions. The answer is that taxation itself is arbitrary, taking from the people a part of their annual income for public purposes; and any tax system which attempts to distribute the burdens in a relatively equitable manner must be arbitrary and autocratic. If not arbitrary and autocratic, the result is tax evasion, and evasion means the shifting of the proper share of the burden of taxation to those who do not or cannot resort to evasion. . . .

7. The objection may be made that to create the office of county assessor would mean adding ninety-nine new offices in Iowa. The answer is that the revenue bill recommended by the committee would displace about ninety-nine deputy auditors, abolish about 2,500 old offices, and also do away with the useless and quite expensive labor of the same number of local review boards. The new plan means less offices than the old system. With all the duties of the county auditor relating to assessment and taxation taken over by the county assessor, your committee would recommend as a practical economy that the office of county recorder be abolished, and the duties of that office transferred to the county auditor. . . .

8. Regardless of the suggested combination of offices of recorder and auditor, it is the opinion of your committee that the county assessor system would be less expensive than the present plan. Those who have studied the problem concur in this opinion, and the experience of the state of Washington with both systems proves that the township plan is more expensive. The Kansas tax commission estimated that the county assessor system would save $125,000.00 a year in that state. Careful study and investigation has satisfied your committee that under the county assessor plan, properly supervised by a state board, millions of dollars of property, especially intangible, will be placed on the assessment rolls, which, under our present inefficient system, escape all burdens of taxation. If the county assessor plan were more expensive, which it is not, the added expense would be the best investment the people of Iowa could make at this time.

9. The local township board of review does not efficiently review the work of the local assessor. Not more than five or six states still retain this antiquated and useless system. The large majority of states have a county board of review clothed with authority to equalize assessments between individuals and classes of property. The recommendation of the committee that the local board of review be abolished, is therefore based on sound practice and long experience. In New England the so-called town board still survives, but functions as a board of relief on appeal and not in any proper sense a board of review. If at least forty-two states can get along without local boards of review and more than three-fourths of the states have never had such boards, we believe that Iowa can safely profit by their example and experience. . . .

10. The plan of county assessment is based on practical experience, and has the universal endorsement of economists and tax administrators. Thirty states now have county assessment. Illinois, Indiana, Kansas, Minnesota, New Jersey, Pennsylvania, and Wisconsin in addition have county supervision of assessment. Wisconsin, Minnesota, North and South Dakota and Kansas are good examples of states that are now making every effort to provide for county assessment. . . .

12. Finally, as already pointed out, necessary state and local budget reform, a state income tax, and certain other taxes are not practicable except through appointed assessors properly directed and supervised by a state board of assessment and review.

One additional point should be suggested. The county assessor is necessary in order to take into consideration the average net earnings of farm lands in arriving at the actual value of this class of property for purposes of taxation. If the recommendation of certain farm organizations that average net earnings be given more serious consideration in comparing the taxable value of farm lands with the taxable value of other classes of property are adopted, it will become necessary to introduce practicable systems of farm accounts, and collect reliable data regarding earnings in much the same way that data

in the past have been collected dealing with the market or sale value of farm lands. The writer believes that this point of view is worth while; but it cannot be put into practice, except through a high type of county assessors carefully supervised by a State Board of Assessment and Review.

Only a word need be said regarding the desirability of providing a permanent State Board of Assessment and Review. All of the facts and conditions outlined above, in favor of county assessors hold true for a permanent state tax board. Indeed a state board giving all of its time to the work of assessment, equalization, taxation, and budget matters, is the keystone of the arch of efficient tax administration.

As already pointed out, the property tax problem alone of Iowa represents an annual business of over $100,000,000. If we add other forms of taxation, various fees, and special assessments, we have an annual business of not less than $200,000,000, possibly more. A business of this size and complexity should have a permanent head. There is no permanent head at the present time, either in the state or in the county, which explains the almost complete breakdown of our existing pioneer system of local assessment. These comments are in no sense a reflection on members of the executive council, past or present. The fault is one of system not of men. The present executive council would no doubt make an excellent state board of assessment and review, if all of its time were devoted to that particular line of work. With numerous other duties to perform, only a very short time can be, and in fact is, given over to matters of assessment and taxation. We believe that the original assessment of the property of various public service corporations representing hundreds of millions of dollars, the review or equalization of the assessments of all classes and forms of property throughout the state, and general supervision of budget and closely allied financial matters, is too important to receive merely the nominal supervision of an ex-officio body.

The first argument that is certain to be used by the average person against a permanent state board of assessment and review, is one which has little or nothing to do with the real merits of the problem. We refer to the contention that it would mean one more state board, which, by the way, is not necessarily true. Just as the office of county recorder can readily be taken over by the county auditor, as recommended by the Committee, thus making an additional county officer unnecessary, so various state boards and commissions may be consolidated. In a word, it is quite possible to reduce the number of state boards and commissions, and still provide a state board of assessment and review, without which a modern system of assessment and taxation is not only impracticable but impossible.

A more important consideration, however, is the generally recognized fact that, without a permanent state board, numerous forms of intangible property and various classes of taxable income are certain to escape all burdens of taxation. This has meant in the past, and might mean in the future, an additional burden on real estate. It is entirely possible that one per cent of the additional revenue obtained from classes of property and income, now escaping all burdens of taxation, resulting from the more efficient work of county assessors supervised by a permanent state board, will pay all the expenses of such a board.

The Legislative Tax Committee has suggested the desirability of various tax reforms, especially an income tax; but has definitely recommended, in the form of bills, only three substantive changes in the present tax laws: first, consideration of earnings, past, present, and prospective, if any, in arriving at the actual value of property for purposes of taxation; second, a gasoline tax of one cent per gallon, to be expended on the secondary roads; and third, a tax on amusements, the proceeds of the same to become a part of the county school fund.

The recommendations that earnings be given special consideration in arriving at the actual value of property for purposes of taxation is so important and outstanding that the writer prefers to quote the exact language of the Legislative Tax Committee on this point, which is as follows:

"All property subject to taxation shall be valued at its actual value, and shall be listed and assessed at said actual value. In arriving at said actual value, the assessor shall take into consideration its productive and earning capacity, if any, past, present, and prospective; its market value, if any, and all other matters that effect the actual value of said property."

The general property tax has always been the basis of public revenue in Iowa, and the relative importance of this tax emphasizes the necessity of equitable valuation and efficient administration.

The valuation of property for purposes of taxation in a just and equitable manner is probably the most difficult part of any and every tax administration.

The law at present, in section 1305 of the supplement to the code, 1913, defines actual value as "value in the market in the ordinary course of trade"; which the courts have construed to mean the price paid and received in voluntary sales made in open marts of trade under reasonably normal conditions, excluding forced sales, and also sales of a speculative character.

In reaching a decision to recommend this change in the wording of our law governing the basis of value for taxation, your committee carefully considered the general economic, industrial, and agricultural conditions in this state, and the many factors which affect and contribute to the market value of the various classes of property subject to taxation. We must recognize that not all classes of property have a ready market value such as may enable an assessor to readily determine the proper and equitable value for taxation, and it becomes necessary then to consider the other factors, such as past sale value, if any, and the probable prospective sale value, based on the value of, or a capitalization of net earnings of similar properties that do have a sale value, or are in use and producing earnings.

Purely social and personal considerations, including anticipated or speculative factors, any or all of which may temporarily influence sale value, should not be materially considered in determining tax values. Since taxes are levied for the sole purpose of securing the necessary funds for support of public activities, the system of taxation should be so devised that the revenue may be collected with the maximum of certainty and economy. This implies the necessity of collecting taxes from such people and industries as are producing wealth and revenue. The person or property that is not producing wealth must draw upon the principal to pay taxes on that principal, and the final accounting of that process is self-evident and certain. Therefore, ability to pay is an essential factor which must be recognized in any successful plan of taxation. Income from property is the chief factor in creating the ability to pay and is, in the final analysis, the dominating factor in determinng the market value, and consequently, the proper tax value of that property. While market price may be materially influenced or modified by other factors, such a certainty of income, continuity of such income, etc., yet the real basis of value of the great body of property from which we derive taxes, is the income from that property. Such income may be represented by rents, interest, use, or any other advantage that accrues through the control or ownership of property. Your committee is unanimous in recognizing that Iowa is preëminently an agricultural state, and that the welfare and prosperity of the industry of agriculture is fundamentally essential to the welfare and prosperity of all other industries. We also recognize that no industry or class of property should be given any advantage over other industries or classes of property in the incidence of taxation. However, in considering and preparing the five measures submitted for your consideration, we have at all times in mind the paramount importance of protecting our agricultural industry from any discrimination whatsoever as compared to other taxable property.

In amending section 1305 of the supplement to the code, 1913, we propose to give relatively more consideration and importance to the average net earnings of farm lands and relatively less importance to social and personal elements of value in determining the so-called actual value for purposes of taxation. This does not necessarily mean that one farm will be assessed for tax purposes higher than another farm which is potentially of same value, merely because it is better managed and for that reason produces a larger net income. Earnings of this character represent the wages of superior management, which should be clearly distinguished from the average net earnings of farm lands resulting from average management of capital invested in that occupation. Neither is the amendment under consideration in the nature of an income tax, such as might include the wages of management the same as any other form of income; but it is a modification of the present method of determining values of property for taxation, giving some reasonable measure of consideration for the actual or potential income from that property.

The law now requires that property subject to taxation shall be valued at its actual value and assessed at one-fourth of said actual value. While a very limited number of states still hold to this principle of fractional assessment, the vast majority of states require the assessment of property at its actual value.

When the Code of 1897 was adopted, the General Assembly took note of the fact that the property of the state was being assessed at about one-fourth of its actual value. This generally recognized economic fact was given legal sanction in the Code on the theory that property would be listed at more nearly its actual value, if people knew that it would be assessed at only one-fourth of said actual value. The experience of the last quarter of a century, however, has clearly disproved this conception of mass psychology. Assessments have become progressively more inequitable since the Code of 1897 was adopted. Unequal assessments as between parcels and classes of property, and the failure to list hundreds of millions of dollars worth of other classes of taxable property, have been the rule rather than the exception, and fractional assessment has not saved the day, but on the contrary has perhaps aggravated the situation by directing attention away from the really important problem of the

necessity of a more efficient plan of tax administration.

The Committee therefore has recommended that fractional assessment at one-fourth of the actual value be abolished and that property be listed for taxation at its actual value. This means that all tax levies will be one-fourth as high as at present, and that all debt limitation must be reduced in the same proportion. It also means that, through the operation of a state and local budget system, as recommended by the Committee, tax levies and debt limitations may be still further reduced; if, and to the extent, that the aggregate assessed value of the state may be increased as the result of more efficient administration. In other words, taxes may be increased in the future, if people want them increased for certain legitimate purposes; but they will not be increased as in 1913 merely as a result of the purely administrative fact of an aggregate increase of assessed valuation. To solve just this problem is one of the primary functions of the budget system. In short, assessment at actual value, under a proper system of administration, has nothing to do with an increase or decrease of taxes, which is a matter for budget control.

WHAT IS AHEAD IN WISCONSIN INCOME TAXATION?

HENRY B. NELSON

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In estimating situations and conditions of the future, one who has not the power of prophecy must base his deductions and estimates on a study of the tendencies and events of the past and present. For a correct answer, therefore, to the question—"What is Ahead in Wisconsin Income Taxation?" — we must have as a background an understanding of the conditions which led to the passage of the law, its intent, how it was developed to meet changing conditions, and what this tendency of adaptation and development indicates for the future.

The period immediately preceding the passage of the Wisconsin Income Tax Act in 1911 was one filled with discussion and argument. Government activities were rapidly growing both in scope and intensity; public expenditures were on the up grade; new fields were being entered, such as the direction and control of industrial relations, public health, education and the like. If these important governmental activities and functions were to be continued and expanded, a means for meeting the cost must be determined. Either more or less radical changes in the general property tax laws as they stood on the books must be made, or a supplement to them in the nature of a new means for raising revenue, theretofore untried in Wisconsin, must be adopted. Rates of taxation on real estate and personal property were already high, too high for it to be administratively either feasible or wise to increase them to a point sufficient to cover the ever-increasing expenditure. Aside, therefore, from those who argued for an income tax law as a logical and legitimate mode of raising revenue to be incorporated as part of any tax system were arrayed those who saw in such an act the possible solution to the problem then confronting the state—the means for raising the needed revenue without increasing the rates on general property. It was under such conditions that the Wisconsin Income Tax Act became a law.

The passage of the law was widely looked upon as an experiment. It was a new venture for the state, and as such laws in other states had proved failures, was no basis upon which to estimate its value as a revenue-producing measure. For these reasons and to make its passage more certain it was not enacted as an additional tax law, but with the intention for it ultimately to supplant the tax on personal property if the revenue from it came up to the expectations of its passage exempting from taxation certain types of personal property such as moneys and credits, stocks and bonds, etc., theretofore taxable. The

intent of substitution was still further carried out by the personal-tax-offset feature, which allows the receipt for personal property taxes appearing upon the tax roll to be applied as payment of offset against any income tax asessment appearing upon the same year's roll. It may be said in passing that the idea of entirely substituting the income tax law for the tax on personal property is fast being lost sight of, due to increasing expenditures and the necessity for raising large amounts of revenue.

INCOME A PERMANENT BASE OF TAXATION

As a revenue-producer the Wisconsin Income Tax Law has far exceeded even the fondest hopes of its staunchest backers. Its success has rooted it deep in the Wisconsin tax system. It will remain a part of such system; the state will never relinquish this comparatively inexpensive and effective means of raising revenue. It subjects to taxation certain ones such as high-salaried men who own no real estate and hold intangible personal property now exempted, who under the present laws would pay no taxes otherwise, but who receive all benefits of government and should therefore pay some tax for its maintenance. It has become the base for raising additional revenue for specific purposes by the simple means of enacting a surtax rate to apply on the taxable income of taxpayers without the necessity of increasing the rates on general property or searching for another subject of taxation, and has been used in such a manner for raising funds for the Soldiers' Bonus, Soldiers' Educational and Teachers' Retirement Funds.

TREND OF FUTURE LEGISLATION

The changes in the original law made in the past have been mostly for the sake of clearness, but show a decided tendency toward increasing the scope of its effect. Public expenditures have not decreased, rather are they steadily on the increase. A means must be found to meet the increase. What more natural result than a further development of the income tax law in such a way as will tend to produce revenue sufficient to meet these conditions? It is along such lines that we must look to determine what is ahead in Wisconsin Income Taxation. The future will, in the writer's opinion, undoubtedly disclose the following trend to Wisconsin income tax legislation:

(1) The elimination of the secrecy clause, possibly the most radical change, making it possible for others besides the taxing authorities to know the basis of assessments of other taxpayers. The purpose being that such a change will insure even more accurate reports in the future than in the past as, with the returns open to the public, there will be instances where inaccuracies will be reported to the taxing officials by others who are familiar with that particular business which might not otherwise be detected.

(2) An increase of rates either by the imposition of a higher flat rate on corporate income and upon the larger amounts of individual income or a surtax for some special purpose or both.

(3) The complete abolition or sharp limitation of the personal property tax offset against the income tax, thus making the income tax payable in full or in large part without offset of the personal property tax against it.

(4) Removal of the exemption upon dividends received from corporations whose income has been taxed, which are now deductible from the income of both corporations and individuals to the extent that they are paid from income which has been assessed for a tax, thereby making dividends by whomever received taxable in full without exemption; and the taxation of bank dividends now untaxable.

(5) The taxation of insurance received by a corporation or partnership on the lives of its officers, partners or employees as income.

(6) The taxation of income of a resident from a non-resident trustee.

(7) The making taxable or deductible the profit or loss on the sale of property acquired by gift on a basis similar to the provisions applying to the sale of property not so acquired.

(8) The definite exclusion of losses incurred in business outside Wisconsin or from property outside the state and from the sale of property purchased for pleasure or recreation and not acquired or used for profit.

(9) The formulation of a definite statutory apportionment rule fixing the elements to be used in the apportionment of income

derived from within and without Wisconsin.

(10) The placement of foreign corporations transacting their principal business in Wisconsin on the same basis as those organized under the state laws.

(11) The complete exemption of cooperative corporations and associations from income taxation.

(12) The imposition of an interest charge on the assessment of back taxes.

(13) The computation of the tax upon omitted income for past years at a penalty rate not exceeding a maximum to temper the penalty to the degree of intent or carelessness disclosed.

(14) A redistribution of the tax between the town, city or village, county and state to aid rural communities from the method now provided of 70% to the town, city or village, 20% to the county and 10% to the state.

(15) The filing of a report by corporations covering transfers of its stock by or to residents of the state for the preceding year to secure information at the source for assessment of profits on such transactions which might otherwise fail of assessment.

Though the foregoing are changes in the Wisconsin Income Tax Law which may be fairly anticipated, they may not occur this year or next, but they are such as a careful study of the law and the commission's rulings and an intimate acquaintance with its administration indicate are ahead in Wisconsin income taxation just as surely as night follows the day.

FEDERAL TAXATION OF INCOME FROM FEDERAL AND STATE SECURITIES AND SALARIES, UNDER THE SIXTEENTH AMENDMENT

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The tremendous falling-off in receipts from the "income tax" portions of the federal revenue laws, the very proper demand that at least the income from all bonds, federal, state, municipal and otherwise should bear its share in the burdens of conducting governments, the misconceptions arising from the decision in *Evans* v. *Gore* (253 U. S. 245) and the contemplated federal constitutional amendment concerning these and kindred matters, renders timely and apropriate a consideration of these subjects. A reading of the recent article by Garet Garrett entitled "The Public Debt Mania" appearing in the January 13, 1923 *Saturday Evening Post,* and that by Harry Hubbard, Esq., in the December 1920 *Journal of the American Bar Association* in criticism of the *Evans* v. *Gore* decision, give a pretty good idea of the evils for which a remedy is needed, if those articles correctly construe that decision.

It is my personal view, however, that both of those articles misconstrue the scope and effect of that decision, and that the functionary Congress in enacting the federal income tax acts has also misconstrued and misunderstood what that decision does hold, and the scope of its powers under the Sixteenth Amendment, commonly called the income-tax amendment. A quoting of the applicable provisions of the federal constitution, and the more important provisions of the income tax act of Congress, approved November 23, 1921, in force at the present time, will be helpful in a consideration of these matters. Clause I of Section 8 of Article I of the original Constitution provides:

"The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debt and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States";

While clause 4 of section 9 of the same article, as it originally stood, limits in part the foregoing power granted, by providing that:

"No capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

A reading of the Sixteenth Amendment clearly shows that it, in turn, removes only a portion of the last foregoing express limitation. It reads:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

The neglect of the frames of the amendment so to word it that it would expressly and in terms repeal the entire clause 4 above quoted, which has certainly outlived its usefulness as the nation has outgrown the jealousies which caused its original insertion in the constitution, and the doubts (at all times easily to be foreseen) which have, since its ratification, arisen in the minds of many as to the effect and scope of its provisions, are sad commentaries upon the actual incompetence of the functionary Congress as a framer of proposals for even real constitutional amendments under article V, to say nothing of grants of new powers, federal or state. The The article itself, properly interpreted and construed, expresses their legal incompetence, by in effect and as plainly as words can express it, saying that such entirely new grants shall only be proposed by newly elected functionaries selected for the specific purpose by the sovereign people of the United States, meeting in a convention and by making the proposal of the entirely new grant become effective upon the performance of the condition—subsequent of ratification in either of the modes expressly provided in the article. If the call for such a convention be properly worded and the convention properly called, the sovereign authorization for the entirely new grant may thus be gotten back of the proposal and the grant may become effective, which under a republican form of government cannot possibly be the case respecting such entirely new grants of governmental power by mere existing functionaries as are those contained in the Eighteenth, or prohibition amendment, concededly never entrusted by the sovereign to any existing federal functionaries before its proposal and adoption. All other of the nineteen amendments were true and real amendments of pre-existing federal powers; the purely intra-state provisions of the Eighteenth amendment attempted a new grant by existing functionaries, and it is therefore necessarily and inescapably void, notwithstanding the Supreme Court has in its ultimate conclusions only, in *Rhode Island* v. *Palmer,* (253 U. S. 350) declared otherwise, in a case wherein this, the only fundamental point really involved was never made at all or even hinted at. Much as every loyal American admires our great United States Supreme Court and the learning of its individual membership, they are but human and prove it conclusively by erring sometimes (seldom tho it be). As truly stated by James Coolidge Carter: "A judicial precedent is not law per se, but evidence of it only". Only the Constitution itself—the sovereign command reduced to writing—is real law. And in our country, nothing is decided finally until it is decided right, i. e., in accord with the sovereign command of the People of the United States, the sole and only sovereign in America. The constitution is that sovereign command reduced to writing, and is the sole and only real law, of which court decisions, or the construction of any other mere functionaries, be they executive, legislative or judicial, are merely evidence of what it does command.

Such conventions for proposing amendments and grants of new governmental power, as well as conventions for ratifying proposals submitted to them, would, without doubt, be composed of some of the best minds and most competent men and women in both state and nation, especially selected and elected by the people themselves for the single specific purpose; whereas it is not to be expected, and previous mutilations of our blessed constitution by existing functionaries show, that Congress and state legislatures, elected for entirely other and different purposes than the one of framing, proposing and ratifying amendments only, should have more than ordinary qualifications in that regard, even if they possess that.

While as above intimated, under article V, Congress has the clearly granted power to "propose amendments to this Constitution", it would be much better and the results would be more satisfactory, were proposals even of amendments to be made by conventions; yet if Congress is, as I understand to be contemplated by them, to propose an amendment upon the subject under consideration, three matters in such

a proposal should in my opinion be carefully covered; 1-The proposed amendment should in terms expressly repeal clause 4 of section 9 of article 1, and thus remove any question concerning direct and indirect taxes, which have caused all the confusion since the very correct and proper decision in *Pollock* v. *Farmers' Loan and Trust Company* (157 U. S. 429 & 158 U. S. 601); 2-In order to prevent all possibility of future misconstruction as to the intention of the amendment, it should expressly provide that Congress should have power to tax all bonds, federal, state, municipal, local and otherwise, both principal and income; and 3-The salaries of all governmental functionaries (that of the president and federal and state judges alone excepted), federal, state, municipal or whatnot. And it occurs to me that even though Congress propose such an amendment, it would be the part of wisdom for it to provide that the ratifying agencies should be conventions in the several states, rather than the legislatures, the membership of which of late years seems to be very largely merely the spokesmen or tools of the corporate interests contributing to their elections, and consequently less expressive of the undoubted public demand for such amendment than conventions especially elected for the specific, sole and only purpose of either ratifying or failing to ratify the proposal or proposals submitted.

While, as above stated, such a constitutional amendment should be proposed and gotten on the way toward ratification without delay, and would be amply justified, even if it were merely to complete the work left incomplete in the Sixteenth amendment, by entirely repealing said clause four, which in practise has merely furnished of late years a cloak for tax evasion by governmental bond-holders and others best able to stand its burdens; I do not want to be understood as conceding by any means that under the Sixteenth amendment and a properly framed act of Congress either the bonds or obligations of the federal or state governments or subdivisions, or the salaries of any governmental functionaries (other than the president and federal judges, whose salaries the present constitution declares shall "not be diminished" during their term of office), are not taxable or that the Supreme Court, since the Sixteenth amendment, has ever so held. The fact is that it is the functionary Congress rather than the court which has exempted them as a reading of section 213 of the Revenue Act of 1921, and particularly the definitions in subdivision (a) of said section 213 of what gross income includes, and in subdivision (b) of what it does not include, will disclose. The decision usually relied upon by those who claim that the court has exempted the salaries of all governmental functionaries and the income from the bonds and obligations of the federal, state and local governments, is that in *Evans* v. *Gore supra,* and particularly that portion of the opinion of Mr. Justice VanDevanter in that case, wherein he quotes the language used by Chief Justice White in *Brushaber* v. *Union Pacific Railroad Company* (240 U. S. 1) at p. 17-18, being the first case sustaining the constitutionality of the Sixteenth Amendment, as follows:

"It is clear on the face of this text that it does not purport to confer power to levy income taxes in a general sense—an authority already possessed and never questioned."

But, clearly, that remark was directed solely to, and effectively answered, a contention that the amendment was itself unconstitutional, because it granted a new federal power, by mere existing functionaries, without any sovereign authorization back of the supposed new grant; and that the existing functionaries proposing and ratifying the amendment were without sovereign authorization to grant, and possessed merely sovereign authorization to amend the federal grants existing. In other words, the language used had no reference whatever to the construction of the language of the amendment, if held, as it was very properly held, to be a valid amendment to the constitution, and the express concession in the brief of counsel for the government, quoted on page 259 of the opinion in the *Evans* case, as follows:

"It is not, in view of recent decisions [and he particularly refers to that in the Brushaber case, *supra*], contended that this amendment rendered taxable as income anything which was not so taxable before",

was a wholly unnecessary, not to say erroneous concession by the functionary counsel, whose own salary might be affected the one way or the other possibly. Nor was argument for its exemption af-

forded, by a decision that federal judge Evans' salary was exempt, because of merely "implied" limitations, to be held by the court to exist against the taxing of governmental salaries and bonds prior to the Sixteenth amendment. Clearly, as stated on page 247 of the opinion of the court in the Evans case, the sole and only contention or question involved was:

"The plaintiff [federal Judge Evans] insists that the provision in section 213 which subjects him to a tax in respect of his compensation as a judge by its necessary operation and effect diminishes that compensation and therefore is repugnant to the constitutional limitation just quoted" [being section 1 of article III, which provides: ". . . The Judges . . . shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office"].

Clearly and unmistakably, the sole and only possible question involved in that case was, whether or not the language of the Sixteenth amendment. to the effect that Congress may thereafter tax "incomes, from whatever source derived" effected and resulted in a repeal of that express provision in section 1 of article III, that judicial salaries "shall not be diminished". Clearly, the Sixteenth amendment did not expressly refer to said section 1 of article III, and hence if a repeal was effected it was merely an implied and not an express repeal of said section. It was up to the court to decide the case; and while, as is usually the case concerning what is or is not merely implied, and the real intent of the language used, there was room for a decision either the one way or the other. In other words. as in most instances concerning what is merely implied, in the absence of a clear and unambiguous expression in words of the intention of the constitution framer, the decision at best must involve more or less of a mere guess or speculation by the court, concerning the intention of the sovereign from the ambiguous and not clearly expressed language used. I did not think that any of the language used in the opinion goes beyond that specific point presented for decision; but if it does, clearly and indisputably, all else than what was essential and indispensable, to the decision made was and is necessarily merely *obiter dicta* unnecessary to that decision and, in the oft-repeated words of the court, speaking through Chief Justice Marshall. "ought not to control the judgment in a subsequent suit, when the very point is presented for decision" (*Cohens* v. *Va.* 6 Wheat. 264, 399). It is not every remark in a judicial opinion that amounts to a judicial decision.

It was all very well and proper under the unamended constitution and before the Sixteenth amendment, for the court, in the absence of any express limitation upon an exercise of the taxing power, to hold as it did many times, that all salaries of governmental functionaries, and all bonds and securities issued by the governments, federal, state and local were impliedly exempted from the operation of the taxing power; the sovereign people had, up to that time, never unambiguously or expressly spoken upon the subject, and the court, upon the question being put up to it for decision, was forced to decide the very question presented, by declaring what the sovereign intention unexpressed was, and to arrive at that intent as best they could, through an application of the approved and proper rules of construction applicable in such cases—rules, it must be conceded, wholly inapplicable and not permissible. where the intention is clear and the language express. If the sovereign intention be unambiguous and clearly expressed, no room exists for the application of any rules of construction, implication, guess, or speculation concerning the intention of the sovereign, and it is for the court to enforce the sovereign will as unambiguously expressed. The court's very proper and best "guess" (without intending to use that word in an offensive. but nevertheless in a real sense), was that under the original constitution and prior to the Sixteenth amendment. it was more reasonable to suppose that a sensible all-powerful sovereign people would not without expressly saying so, intend to tax its own creatures and governmental agencies, or the governmental obligations it authorized the issue of; but there was no certainty but merely an implication to that effect. In other words. and speaking of course very generally, what is merely implied is necessarily supplied by the functionary and not by the unambiguous sovereign command itself.—it is authorized and necessary judicial legislation and consequently lawfully removable by the amending functionaries existing under article V. Had

the limitation been express, and in the language of the sovereign people themselves to the effect that the federal government should not tax salaries and governmental obligations, doubt might exist as to the power of the existing amending functionaries to remove the limitation, without an entirely new and theretofore non-existing sovereign authorization so to do, through a convention specially elected and selected under article V, for the specific purpose. Authority to tax in such case might well be said to be "not an amendment of this constitution" but the grant of an entirely new and therefore unpossessed federal power. It would without question be something more than a mere change in the manner and mode of exercise of a federal power already possessed.

But, certainly, after the constitution was lawfully amended, as expressly authorized by the sovereign people, by the Sixteenth amendment, as to declare that "incomes, from whatever source derived" are lawfully taxable to Congress, the implication theretofore held by the functionary court to exist, of a functionary limitation, has been authoritatively removed, through authorization of the sovereign, and the theretofore ambiguous sovereign intent made clear, with sovereign authorization. Since the authorized and lawful adoption of the Sixteenth amendment, certainly, there can be no serious room for contention that the salaries of all functionaries (the president and judges alone excepted), and "income" from all bonds and obligations of government, federal, state and local, are lawfully taxable by Congress.

To hold otherwise would be to deny the sovereignty of the People of the United States—the sole and only sovereign in America; to hold otherwise, since the Sixteenth Amendment, would be in effect to hold that this is not a republic, and that the government is not "republican in form"; that the sovereign People of the United States cannot do or authorize what they will with their constitution, governments, creatures and functionaries, federal, state and reserved. In this connection, a quotation from the greatest, as it was also one of the earliest decisions of the United States Supreme Court, written by certainly its greatest legal mind,—the opinion of Mr. Justice James Wilson in *Chisolm* v. *Georgia* (2 Dallas 419, 453),—concerning the much confused and worse abused and little understood term "sovereign" and its necessarily inherent, unlimited, indivisible, inalienable and humanly and territorially omnipotent powers, is pertinent and helpful. He says:

"The perverted use of *genus* and *species* in logic, and of *impressions* and *ideas* in metaphysics, have never done mischief so extensive or so practically pernicious, as has been done by *states* and *sovereigns*, in politics and jurisprudence."

True sovereignty not only does not, but it is an actual impossibility that it should, reside in any government, creatures or functionaries of the sovereign people of the nation. The powers of all American governments, creatures and functionaries, are not sovereign but merely derived from, held in trust for, and belonging solely and exclusively to the sovereign people of the United States who, as stated in its preamble "ordained and established" the constitution, and were and are alone competent ever to ordain or establish, or authorize the establishment of any Constitution, exercise any governmental power whatever by functionaries and creatures, or to in any manner make or authorize its change or amendment. It is fundamental to all lawful government, and is particularly so recognized in America, that any governmental power whatever, exercised by government or functionaries, without sovereign authorization, is necessarily unauthorized and a usurpation by functionaries. To appreciate the conclusion that neither the court, for whom he was speaking, nor Mr. Justice VanDevanter, the writer of the opinion in *Evans* v. *Gore supra,* could have intended, by anything that was stated in that opinion, to lend countenance to any exemption of income from any bonds or salaries of any functionaries (other than the president and judges), it is necessary to bear constantly in mind that he expressly recognized the principle I am contending for by stating in his opinion in *Dillon* v. *Gloss* (256 U. S. 368, 374) that all governmental powers exercised by functionaries:

"must have the sanction of the people of the United States, the original fountain of power."

The fundamental doctrine is deemed settled, notwithstanding that the erroneous

concessions against interest and the failure by counsel attacking the so-called Eighteenth Amendment to assert any vital reason, led the overworked court into a failure in the so-called prohibition cases to distinguish between the powers of existing functionaries and of those to be specially created for the purpose by the sovereign, under article V of the Constitution. While there may be more or less truth in the statement that " there is nothing certain concerning what a court will decide except uncertainty " until the case is properly presented, judging from prior decide except uncertainty " until the case lies and was responsible for them, it may with safety be asserted that in any properly presented case the court will hold that since the Sixteenth Amendment, income from all bonds, governmental or otherwise, and salaries of all functionaries, other than the president and judges expressly exempted, will be and is taxable under any lawful act of Congress expressly so declaring.

DECISIONS AND RULINGS

EDITED BY A. E. HOLCOMB

Income, Federal—Taxation of Citizen Permanently Residing Abroad.—The federal district court has answered affirmatively the important question whether the income tax may constitutionally be imposed upon a United States citizen residing abroad, with respect to income derived solely from sources within a foreign country. Plaintiff was a citizen who had resided continuously since 1890 in Mexico. His entire income came from real and personal property, having a permanent situs in that country. A tax was assessed, which was paid under protest and suit was brought to recover, upon the single constitutional issue above stated.

The court referred to such tax as rare, this country being the only one to attempt to impose it, and to the decision in *U. S.* v. *Goelet,* 232 U. S. 293, describing it as an abnormal and unusual exercise of the taxing power, but found that the act of 1921 and the Regulations promulgated, left no room for question that Congress had sought to tax plaintiff's income and had used apt words to accomplish its purpose.

Plaintiff however, asserted that nevertheless Congress lacked the constitutional power to subject him to the burden, arguing that the Sixteenth Amendment did not make taxable anything not before taxable, but merely removed the necessity of apportionment (*Evans* v. *Gore,* 253 U. S. 260) ; that the income in question, being derived from real and tangible personal property having a permanent location, the tax was a direct tax (*Pollock* v. *F. L. & T. Co.* 157 U. S. 429) ; that it had never been contended that Congress could levy a direct tax upon property in a foreign land (*Loughborough* v. *Blake,* 18 U. S. 146) ; and that the same principle was derived from the case of *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, and was expressed as well in the Fifth Amendment.

The court observed that accepting the plaintiff's contention that the tax is a direct tax, his reasoning was clear and carried further than was necessary for the decision of the case, as it would prevent the taxation of a resident citizen with respect to income from foreign sources, but that it was clearly established that since the Sixteenth Amendment an income tax is never a direct tax : that the amendment removed it from that category and placed it in the class of excises, duties and imposts (*Brushaber* v. *U. P. R. R.,* 240 U. S. 1 ; *Stanton* v. *Baltic Mining Co.,* id. 103, 112). It further observed that in *Maquire* v. *Trefry,* 253 U. S. 12, the court expressly answered in the affirmative the question whether a state might tax one of its residents upon income from sources outside of its jurisdiction.

The plaintiff contended that prior to the Sixteenth Amendment an income tax was either a direct tax and subject to apportionment or an excise tax. If the former, the amendment did not make taxable what was not before taxable and it had never been held that Congress had power to lay a direct tax upon property in foreign countries ; if the latter, the authority to impose excises was limited to United States territory (*U. S.* v. *Rice,* 4 Wheat. 246).

He contended finally that the logic of

the *Union Transit* case and of other cases and the conclusions of eminent text writers negatived the power asserted, in the case of the states and that the ground of the decision in the *Union Transit* case was in part one which negatived an analogous power in the federal government.

The court referred at length to the important practical differences between the relation of a state and the United States respectively to their non-resident citizens, which it said the plaintiff had lost sight of. These differences were the minor importance to such a non-resident, of his relations to his state of residence, the insignificance of the effect of a change of residence from one state to another and the ease of such a change.

On the other hand United States citizenship carried much greater significance both in its effect on the individual and in the possible results in the way of protection, with the consequent responsibilities resting upon the United States in its international relations. It was not unreasonable that citizenship which involved such far-reaching possibilities in the way of cost, should require contribution by the citizen towards the maintenance of the elaborate insurance provided. For nearly sixty years Congress had thought so and text-writers of high authority had assumed the lawful existence of power to exact such contribution. (Webster on Citizenship, 163-169). The Supreme Court in *U. S.* v. *Goelet, supra*, had said that it did not question in the slightest degree the power to impose an excise duty upon a foreign-built yacht owned by a citizen, though permanently domiciled abroad.

The court expressly waived aside the question of the policy of the tax in question, observing that such a question should be addressed to Congress.

The demurrer to the declaration was sustained—*Cook* v. *Tait, Collector*, U. S. Dist. Ct., Dist. of Md., Jan. 22, 1923.

Income, Federal — Retroactive Application — Dissolved Corporation — Liability of Stockholders for Taxes. —The federal district court held that a corporation dissolved June 1, 1917, was properly subjected to tax imposed retroactively under the Act of October 3, 1917, as well as to tax under the Act of September 8, 1916; that stockholders of the dissolved corporation at the time of dissolution were liable for the taxes assessed under such acts.

In this case the corporation was owned equally by two stockholders and made large profits during the five months of operation in 1917. An agreement was reached which was subject to conflicting claims, but which the court held to be a sale of his stock by one stockholder to the other, after which the assets were sold to a partnership and the business was continued in that form by the stockholder who had purchased the stock of the corporation. Income tax for 1917 was assessed in 1920 and suit was brought by the government against the corporation and the two stockholders. One of these paid one-half of the tax and claimed that the other stockholder should pay the other one-half, upon the claim that he had shared in a distribution upon dissolution. As stated, the court held that the transaction was a sale of stock and not a distribution of assets and that the selling stockholder was not liable.

The government's contention that he was liable was based in part upon the ground that he had depleted the assets of the corporation and that it was immaterial to the government whether he received his portion as the result of a sale of his stock or as his portion of the assets. This was based upon the socalled trust doctrine. The court however, observed that it was only in cases of fraud that the doctrine applied; that here the selling stockholder had no part in the transactions subsequent to the sale of his stock—*United States* v. *Boss & Peake Automobile Co., C. L. Boss and E. W. A. Peake*, U. S. D. C., Dist. Ore., Dec. 11, 1922.

Income Federal—Salaries of Federal Judges.—The application of the income tax law contained in the Revenue Act of 1918, to salaries of federal judges taking office subsequent to the passage of the act, was considered in a recent case in the federal district court. Under the decision by the supreme court in *Evans* v. *Gore*, 253 U. S. 245, it was made clear that salaries of federal judges appointed prior to the act were not taxable. The judge in this case was a member of the federal court of claims who qualified as such September 1, 1919, and whose status was not

therefore directly within the above decision. The government contended that the dragnet provision of section 1402 of the act was adequate to render the salary in this case taxable but the court held that this provision was not available because the entire clause relied upon had been held invalid in the Gore case so that there was no clause left in the act affecting the matter which could be held unimpaired by the decision in that case. The suggestion was made that the government's position would have been stronger if there had been in the Act of 1918 a provision similar to that found in section 1403 of the Act of 1921. The demurrer of the government was overruled—*Graham* v. *Miles* 284 Fed. 878.

INCOME, FEDERAL — EXEMPTION OF BUILDING AND LOAN ASSOCIATIONS.—When a building and loan association ceases to be substantially mutual and adopts as its chief business dealing for profit with the general public by the methods of an ordinary savings bank, it is not entitled to exemption under section 231, of the Revenue Act of 1918.

The making of loans to non-members or borrowing from non-members does not defeat exemption under that section if such transactions are simply incidental to the primary business of operating a building and loan association—*The Lilley Building & Loan Co.* v. *Miller,* U. S. C. C. A., 6th Circ., Ohio, Feb. 6, 1923. See *Bul.* VII, 293.

INCOME, STATE — PROFIT ON SALE — VALUE OF CORPORATE STOCK.—The Wisconsin court held that in ascertaining the profit made on sale of stock, the board of review properly deducted from the total value of the assets shown by the balance sheet the amount of the item designated "appraisal adjustment", entered to reconcile the value of the plant and equipment of the company as appraised by appraisers and the book values thereof; that the market value was to be determined from the value of the stock generally, and not from any special value which accrued to the sellers by reason of their majority control.—*Lewis* v. *City of Racine,* 190 N. W. 476.

INCOME, STATE — CONSIDERATION FOR LEASE ON PRODUCING OIL PROPERTY CONSTITUTES "INCOME" TO OWNER OF LAND.—Under the Oklahoma income tax law the consideration paid for a lease on already producing oil property constitutes income to the owner of the land.—*Carter* v. *Rector et al.*, 210 Pac. 1035.

CAPITAL STOCK, FEDERAL.—The capital stock tax imposed by Sec. 407 of the Act of Sept. 8, 1916 is an excise or privilege tax, measured by the property of a corporation and is not a tax laid directly on property. The words "capital stock" include intangible as well as tangible assets. When the statute speaks of "estimating" capital stock, and of arriving at the "fair average value" thereof for a year, the words are inappropriate to the process of transcribing book values. Referring to the legislative history of the act, the court holds that the intention of Congress was to permit and indeed compel, in estimating the fair average value, the consideration not only of paid-in capital, surplus and undivided profits, but of earnings and market value of shares as well. In other words, "fair" includes "the entire potentiality of the corporation to profit by the exercise of its corporate franchise".—*Central Union Trust Co.*, v. *Edwards,* U. S. C. C. A., 2d Circ., N. Y. See *Bul.* VIII, 15.

FEDERAL TAXES—RECOVERY OF TAXES PAID—REFUNDS.—A taxpayer who voluntarily and without protest pays his tax, based upon figures for which he alone is responsible, but who subsequently discovers that he has made a mistake, may not bring an action against the collector who received his voluntary payment, to recover the amount of the alleged overpayment, where such overpayment was due, not to any action on the part of the collector or any other taxing official, but solely to the taxpayer's own error (District Court, 280 Fed. 413, affirmed.) Sec. 252, Revenue Act of 1918, has nothing whatever to do with the collector of internal revenue or with an action against him, payment under protest as a prerequisite to recovery from him of tax paid is therefore not affected thereby.

The primary purpose of the enactment

of sec. 252, Revenue Act of 1918, was to permit the commissioner of internal revenue of his own volition, upon discovery of any overpayment of tax to credit or refund the same, limiting the time within which such credit or refund could be made to five years from the date the return was due, notwithstanding the provision of sec. 3228 R. S. The section gave to the commissioner power to credit or refund overpayment where no claim for refund was filed by the taxpayer, a power which prior to its enactment he did not have, since under sec. 3220 R. S. an appeal must be made to the commissioner before taxes could be refunded.

Section 252 has nothing whatever to do with the collector of internal revenue or with an action against him. The power or duty to make refunds thereunder is vested not in the collector but in the commissoner of internal revenue. It does not confer a right to bring an action against the collector in cases in which no liability otherwise existed.—*Fox* v. *Edwards,* U. S. C. C. A; 2d Circ., Jan. 30, 1923. See *Bul.* VII, 222.

Federal Taxes—Restraining Assessment and Collection—Construction of 3224 and 3226 R. S.—A company which had been, in 1922, assessed additional taxes for 1916, 1917 and 1918, filed a claim for abatement and gave the required bond. In failure of the commissioner to act on said abatement claim within the six months period, the company brought an action to restrain the assessment and collection of the tax. It was held that such an action is barred by sec. 3224 R. S. and as the provisions of sec. 3226 R. S. relate to recovery of taxes already paid and prescribe a method of appeal, an action cannot be brought thereunder until there has been at least a substantial compliance therewith. These two sections cannot be construed in *pari materia.* Section 3226 relates to a recovery from the government of a tax already paid, otherwise there would be an irreconcilable repugnancy between it and section 3224.—*Union Fisherman's Cooperative Packing Co.* v. *Huntley,* U. S. D. C., Oregon, Jan. 1923.

Relief and Review—Lapse of Parties during Pendency of Suit.—In the February issue of the *Bulletin,* reference was made to the existing state of the law on the substitution of public officers, in suits against their predecessors, to enjoin them from enforcing statutes or to compel them to act by mandamus. Such suits are personal actions and abate upon the death or retirement from office of the officers, in the absence of statutory provision for continuance against their successors. *Gorham Mfg. Co.* v. *Wendell,* U. S. Sup. Ct., Jan. 2, 1923. *Bul.* VIII, 146.

Such a situation arose in connection with an action involving the New York corporation income tax and a motion was made to substitute the state tax commission for the state comptroller.

The court found that there was a plain intimation in *Irwin* v. *Wright,* 258 U. S. 219, that the federal courts could avail themselves of any state provision for substitution and held that such courts need not be astute to enforce abatement, if any basis at all can be found in state law or in the practice of the state courts for substitution.

In this instance, the court was able to find justification for the substitution under a state law through a decision of the New York court (*People ex rel. Broderick* v. *Morton,* 156 N. Y. 136) and upon the strength of that decision the motion was granted.—*Gorham Mfg. Co.* v. *Wendell,* U. S. Sup. Ct., Feb. 19, 1923. See *Bul.* VI, 224.

Special Assessments—Basis of Benefit.—The United States Supreme Court recently reviewed its rulings in cases where special assessments for benefits were claimed to have been laid in such arbitrary and unequal manner as to come within the application of the Fourteenth Amendment. In denying such application the court quoted from its decision in *Houck* v. *Little River District,* 239 U. S. 254, where the principles were stated, from which it held in the instant case that the mere fact that there was no direct and immediate benefit to the lands in question did not render the assessments invalid; that the basis of assessment was within the discretion of the state whose court had held that the valuation as shown in the assessment rolls was a proper basis and that the owners were properly protected through provision for a hearing with re-

spect to such valuation for the purpose of property taxation. On the whole case, the court held that there was no such showing of palpably arbitrary and plain abuse of power as was necessary to invoke the provisions of the Fourteenth Amendment.—*Valley Farms Co. of Yonkers* v. *County of Westchester,* U. S. Sup. Ct., Feb. 19, 1923.

EXEMPTIONS — "HEAD OF FAMILY"; "RESIDING WITH HIM".—A bankrupt, at the time of bankruptcy unmarried and residing at a hotel, but maintaining and supporting a minor adopted daughter at a convent school, was held entitled to statutory exemptions as head of family under a North Dakota act defining "heads of a family" as every person who has residing on the premises with him or her, and under his or her care and maintenance, either his or her child *** whether by birth or adoption; the residence of the daughter while absent at school being with him, within the meaning of the statute.—*In re Stearns,* 284 Fed. 578.

EXEMPTIONS — CHARITABLE PURPOSES.—Real estate actually and exclusively used for charitable purposes is exempt from taxation under the New Jersey statutes. The real estate used annually by a charitable organization for summer home purposes was assessed. It appeared that on the assessment date the home was closed for the season, and the assessment was made on the theory that as the real estate was not actually used on the assessment date, the exemption did not apply. The court set the assessment aside, holding that the construction of the statute made by the assessors was too rigid and narrow in its application to the facts.—*Seaside Home* v. *State Board of Taxes and Assessment,* 118 Atl. 704.

DOING BUSINESS — INTERSTATE COMMERCE. — A foreign corporation rented a storeroom in Missouri, put up a sign with its name thereon and placed an employee in charge whose activities consisted of buying milk and cream, which he shipped to the company's creamery in Illinois. In resisting proceedings brought against it for failing to obtain a certificate of authority to do business in the state, the company claimed that its acts were merely incidental to its interstate commerce business and did not constitute "doing business" within the meaning of statute. The court held that the purchasing of milk and cream was separate and apart from interstate commerce and constituted intrastate business which made the company subject to the statute in question.—*State* v. *Pioneer Creamery Co.,* 245 S. W. 361.

ASSESSMENT—"FAIR AND REASONABLE VALUE" — "CASH VALUE". — The Alabama act providing that taxable property shall be assessed 60 per cent. of its "fair and reasonable value," means the best price obtainable at a voluntary sale, to be paid at once in money, and excluding any additional amount that might be had, were credit or terms allowed. "Cash" means not merely money, but money in hand, readily available, paid down, especially coin or government or bank notes; "cash sale" being a sale for ready money, goods, or stocks, for immediate delivery and payment, as distinguished from a credit sale or for future delivery; "cash value" importing value in money presently paid.

In determining the fair and reasonable value to be used for taxation purposes, a jury is not bound by the testimony of expert witnesses, but may exercise their common judgment in the light of all the evidence.—*State* v. *Woodward,* 93 So. 826.

ASSESSMENT—OVERVALUATION NOT AN INJUSTICE.—Under the New Mexico statutes, if an error is discovered in an assessment roll by which an injustice will be done to a taxpayer a proceeding may be brought by the district attorney in behalf of the injured taxpayer in the district court. The court held that overvaluation alone was not such an injustice as authorized such a proceeding and that the statute in question did not clothe the district court with jurisdiction to substitute its judgment as to value for that of the duly constituted taxing authorities.—*State Tax Commission* v. *Dick,* 210 Pac. 392.

LICENSE — PRIVATE INVESTMENT. — A privilege tax is imposed under a Tennessee statute upon those engaged in buying or selling notes or securities. The court held that the statute was not broad enough to include a person who occasionally invested his money in notes or other securities, and

that even if it were, it would be void, since the legislature had no power to impose a privilege tax upon the mere purchase or ownership of property; and that unless the acquisition or sale of property were so exercised as to make it a business, the priviledge might not be taxed.—*Myers* v. *Fulmer*, 245 S. W. 329.

Inheritance, State—Nature of Tax—Contingent Remainder.—Under the Maine law the tax imposed upon "all property * * * which shall pass by will * * * * to any person," is not a tax on the property, but an excise or duty, enforced against the privilege of succeeding to or receiving the title to the property.

Where the will created a contingent remainder, making succession uncertain until removal of contingency, the probate court properly deferred the assessment until the removal of the uncertainty as to the persons to whom the remainder would ultimately go.

Where the will directed the trustee to pay beneficiaries $4,000 annually for indicated purposes, or withhold a portion thereof in readiness for the beneficiary, but authorized the trustee in his discretion to allow beneficiaries as much more as the trustee deemed necessary, not to exceed $10,000, the probate court erred in assessing the tax, on the theory that beneficiary would receive $10,000 annually, but should have based the tax on an annuity of $4,000.—*In re Cassidy's Estate*, 118 Atl. 725.

Inheritance, State — Conditional Gift.—A New Jersey decedent during his life time established several trusts, whereby he made a gift of property to certain charitable corporations, subject to the provision that a portion of the income of the property was to be paid annually to his wife and himself during their respective lives, after which the gift was to become absolute. At the time the trust was created such a transfer was not taxable under the inheritance tax laws, but at the date of decedent's death it was taxable and the state sought to collect the tax. The court held that as the gift did not become absolute until the fulfillment of the conditions under which it was made, the full possession and enjoyment of the property did not take effect until decedent's death, and that the transfer was subject to the law then existing and was taxable.—*American Board of Com'rs. for Foreign Missions* v. *Bugbee*, 118. Atl. 700.

Inheritance, State—Nature of Tax — Valuation — Deduction of Federal Estate Tax.—The Pennsylvania act providing for a transfer tax, does not impose a tax on property, but requires payment to be made from the estate of a decedent for the right of succession or the privilege of receiving at death the property possessed by a decedent. In assessing the tax, the state has power to take the value at death without deductions, or the value actually received by the distributee. as the measure to determine the excise payment. In view of the plain and unambiguous language of the act, in computing the transfer tax, the sum paid to the federal government as an estate tax should not be deducted.—*In re Kirkpatrick's Estate*, 119 Atl. 269.

Inheritance, State—Value of Capital Stock—Good Will.—In determining the value of corporate stock owned by decedent, for the appraisement of the transfer tax thereon, the value of the good will, as shown by the corporation's books, should have been deducted from its book assets, and its value arrived at in the manner provided by law.—*In re Wirth's Estate*, 197 N. Y. Supp. 365.

Inheritance. State — Dower Interest to be Deducted Before Determining Transfer Tax.—Where a widow is entitled to a dower interest, the value of this interest should be deducted before fixing the amount of the transfer tax.—*In re Wetmore's Estate*, 197 N. Y. Supp. 509.

Inheritance, State — Executor's Commissions on Unsold Realty. — Where executor is given power of sale over devised realty, but this power is never exercised, and none of the realty comes into executor's custody, his commissions on this realty should not be deducted as an administration expense in fixing a transfer tax.—*In re Seiss Estate*, 197 N. Y. Supp. 511.

Inheritance, State — Dower. — The Arkansas court held that the right to take dower being a privilege which the legislature might give or withhold as it pleased, it might impose a tax on the exercise thereof against the person to whom it was given; such tax was not one on property, which must be taxed equally and uniformly throughout the state according to its value, but on the privilege or right of succession to it.—*State* v. *Boney,* 245 S. W. 315.

Inheritance, State — Bequest to Foreign Charitable Organizations Exempt.—The Kentucky court held that a bequest to certain hospitals, churches and charitable organizations, none of which were located in the state, was exempt from the inheritance tax under the statute which exempted public, charitable and educational institutions from the tax and that churches were institutions of purely public charity, within the exemption provisions of the statute.—*Sage Ex'rs.* v. *Commonwealth,* 244 S. W. 779.

Income, State—Estate — Deduction of State Inheritance Tax.—The question of the right of an executor, in computing the income of an estate during settlement, to deduct the inheritance tax paid to the state, arose under the New York state income tax law, and it was held that such tax was an allowable deduction.

The court found that the New York law applicable to the income tax on an estate, during settlement, was substantially similar to the federal law and that the question at issue had arisen under the federal law, and it had been held that the federal estate tax paid was deductible in computing the net income tax of the estate (*United States* v. *Woodward,* 256 U. S. 632). That case held that the estate tax was a "tax"; that payment thereof by an executor was not a payment on account of the legatees and that legatees were not entitled to deduct any portion of such tax, in computing their net incomes. It was therefore held, in view of the similarity of the two income tax laws, that the case cited was a very definite precedent for the conclusion that the deduction was proper under the state law.

It was argued against this conclusion that the state transfer tax was a tax on the legacy and thus differed from the federal estate tax which was a definite tax upon the estate as such, but the court found that the state transfer tax was upon the transfer of property, was payable by the executor, who was personally liable therefor until paid; that it constituted a lien upon the property transferred and that the intrinsic nature and purpose of the tax was the same in each law, and therefore, as it was deductible under the federal income tax law, it should also be deductible under the state law.

This view was found supported by *Matter of Merriam,* 141 N. Y. 479, which reached the Supreme Court as *United States* v. *Perkins,* 163 U. S. 625; that court, in affirming, holding that the New York inheritance tax law was in reality a limitation upon the power of a testator to bequeath his property to whom he pleased, a declaration that in the exercise of that power he should contribute a certain percentage to the public use; that the tax was therefore upon the right to dispose of property.

The court held that it followed from that decision that the tax was not upon legacies or legatees and that a legatee was not entitled to deduct any part of the tax, in computing his personal income tax, and that notwithstanding authority and opinion pointing to the contrary, it felt that the principles of the decisions cited should be followed and that the amount paid by an executor in satisfaction of a transfer tax should be deducted in calculating net income of the estate. The action of the tax commission in refusing the deduction was therefore reversed. — *Estate of Andrew Carnegie,* N. Y. Sup. Ct., App. Div., March 7, 1923.

Shares of Stock—"Uniform Rule" —Double Taxation. — The North Carolina court recently had occasion to pass upon the question of the taxation of shares of stock of domestic corporations when the capital stock of the corporations was taxed. Consideration of the matter led to elaborate opinions, with extensive citation of authority. A lengthy dissenting opinion by the Chief Justice reviews the decisions of many states which he cites as authority for conclusions diametrically opposite to those of the court. No question of taxation seems to be more subject to dispute and more unsettled than this one, arising

from the attempt to tax shares of stock. The opposing views seem equally fortified by legal precedent and by arguments based upon principles of justice and equity.

The constitution of the state provides that " laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise." The legislature has provided for the taxation to the corporation of the excess of the value of the total capital stock over the assessed value of the property and certain exempt property, and that the individual shareholder of such a corporation shall not be compelled to list his shares for taxation.

An individual brought proceedings in mandamus to compel the state taxing authorities to compel the listing of shares by shareholders, upon the claim that the constitution prevented exemption thereof and commanded their taxation; that the statute relieving the shareholders was unconstitutional and void and that it was the duty of the officers to enforce compliance with the constitutional provision.

The obvious defense, which was upheld by the court, was that the constitutional provision was not self-executing, and in any event that courts were not empowered to exercise legislative or administrative functions, such as would be involved in allowing the writ. The legislature had acted and had thereby foreclosed contrary action by an administrative officer such as would follow the granting of the writ.

Thus the court really disposed of the case by sustaining the demurrer interposed by the defendant and the elaborate discussion of the relative merits of the contentions made as to double taxation and the various views as to taxation of corporate stock and shares was unnecessary. It was entered into by the court from an evident desire to set the question at rest. The court took the common view that in taxing the entire capital stock the state had complied fully with the constitutional provision and that the shares or " investments in stocks " were thus taxed once and that to tax the shareholders would be double taxation, which, while possible, would not be presumed to be authorized, in the absence of definite provision therefor. There is little new in the extensive and at times heated arguments of the judges, and strangely enough nowhere in the various opinions is reference made to the obvious injustice of such a statute as was here involved, when the corporation in question, as is commonly the case, has property outside of and beyond the jurisdiction of the state. Nor is reference made to the double taxation suffered by non-resident shareholders, in case the entire stock is taxed to the corporation, as other states would tax shares in foreign corporations as North Carolina did. The fact is that the solution of the problem lies in the full recognition of the demands of interstate comity, which this decision seems wholly to ignore. The court very properly held that in law, taxation of the corporation was, in effect, compliance with the uniform rule as to the shares, but in seeking to justify that method of taxation as correct and just, it overlooked some very necessary demands of interstate comity which few states are willing to meet. Furthermore, the effect of the deduction of the assessed value of the property in the state, where such property is largely acquired through bond issues, is entirely ignored.

The opinions, covering twenty-four pages, are worth careful reading by those interested in devising an equitable method of taxing wealth represented in corporate form, under our federal system, under which each state has full jurisdiction over the property within its borders and also over its resident citizens.—*Person* v. *Board of State Tax Commissioners,* 115 S. E. 336.

Assessment — Increase without Notice.—A South Carolina landowner listed property at $13,000. The county board increased the assessment to $34,710, without giving notice thereof to the taxpayer, who first heard of it when paying the taxes. The sole ground for resisting action to recover the taxes as illegally assessed, was that the testimony taken showed that the lowest estimate of the value of the lands was $60,000 and the allegation that their reasonable value was $121,500, from which it was urged that the assessment upon which the taxes were paid was so greatly less than actual value that the taxpayer was not prejudiced by failure to receive the notice of increase required by the statute. This was held no ground for sustaining the assessment as the taxpayer was entitled to a hearing. — *Gibson* v. *Haynie,* 115 S. E. 298.

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The problem of lowering the cost of government is steadily assuming greater proportions, and it bids fair to become, by indirection, one of our most acute taxation issues, if, indeed, it has not already arrived at this stage. Tax problems are centering more and more around the question of how a reduction of burden can be effected, and to a correspondingly diminished degree around the opposite question of still greater increases. This, at least, is the form that the issue takes in the popular mind, whatever may be said of the manner in which it may be viewed by administrators, public officials, and others.

Despite the gravity of the situation, there is a deplorable lack of genuinely constructive achievement in attacking the problem of reducing public expenditures. Hosts of candidates for public office are elected, and still larger hosts stand on the plank of economy and efficiency in office. Wholesale reforms and economies are promised recklessly, and with utter disregard of the problems involved in a lasting and effective cut in public expenses. Practically all of those who promise economy as a bait to the voter overlook the fact that the rising level of governmental cost has come about gradually, quite largely in response to the demands of the people themselves for an extension of governmental services. They also overlook—or neglect to point out—the equally obvious fact that this enlarged structure of governmental functions and activities cannot be torn down to smaller proportions over night. This means, in effect, that real and lasting economy in the cost of government must proceed upon the basis of a thoroughgoing study and examination of the kind of administrative organization that has been built up for the purpose of serving the needs of the people. No other kind of economizing is worth anything at all except for campaign purposes.

We find, accordingly, that the candidates for office, national, state and local, may be grouped, roughly, into two classes. The first, which includes virtually all of them, is almost totally devoid of constructive ideas of how the public money can be saved by better organization and more efficient administration. Some of these say bluntly, "The way to economize is to economize". But real saving in the cost of government requires something more than an epigram, however forceful its point may be. Others, notably state exec-

utives, content themselves with lopping off a few heads here and there, and then relapsing into the old ways.

The other group, which is a very small one in numbers and quite insignificant relatively, appreciates the necessity of a thorough study, not only of the present structure and organization of government, but of an equally thorough constructive program of reorganization and reconstruction. They appreciate that the essential functions and activities of modern government must go on—the problem is, how can these activities be carried on more economically by reducing waste, duplication, and inefficiency. An excellent illustration of the kind of attack upon the problem of governmental economy and retrenchment which the latter group makes, when it has the opportunity, is found in the latest section of the report of Senator F. M. Davenport's Special Joint Committee on Taxation and Retrenchment. This able report discusses in detail the structure of local government in New York State, and in connection with each branch of the local governmental organization offers constructive recommendations looking toward greater efficiency and economy. A summary of the findings and recommendations is presented elsewhere, and it is hoped that we may be able to present later a more comprehensive review of the committee's work by a member of the staff.

PRIZE ESSAY CONTEST

The American Institute of Accountants Foundation announces a series of prizes for the best papers upon the following subject: "The Principles which should Govern the Determination of Capital and the Amounts Available for Distribution of Dividends in the Case of Corporations, with Special Reference to the System of Capital Stocks Without a Par Value."

The following have consented to act as jurors in the contest: Julius H. Barnes, Wesley C. Mitchell, Albert Rathbone, Frederick Strauss and George O. May.

The amount of the prizes will be in the discretion of the jurors, subject, however. to the provision that the first prize shall not be less than $1,000 nor more than $2,500, and that other prizes shall not be less than $250 nor more than $750.

LEGISLATIVE NOTES

Utah. Mr. William Baily, chairman of the Utah State Tax Commission. sends the following account of the recommendations of that body and their fate in the legislature.

The state tax commission recommended the enactment of a gasoline tax; the revision of the present automobile registration tax; the revision of the annual corporation license tax, and an amendment to the present method of taxing banks, to provide for the assessment of a bank upon the basis of its capital, surplus and undivided profits, instead of upon the market value of the shares which is the present method. and also to include the taxation of mortgage loan and trust companies upon the same basis. The commission also recommended that a bill be enacted which would place a limit upon the levying powers of the various taxing units which now have authority to make tax levies.

All of the above proposals were introduced in the legislature and bills were passed covering all of these subjects except the proposal to amend the present statutes relating to the taxation of banks. The bill which was introduced covering this point was talked to death, and when a substitute measure was introduced to include mortgage loan and trust companies it met the same fate.

The commission recommended the imposition of a gasoline tax at the rate of 2 cents per gallon to be paid by wholesalers, the funds to be used to pay for the interest and sinking fund charges on state road bonds and for the maintenance of state roads. As a companion measure the commission recommended that the present graduated rates for motor vehicle registration licenses be reduced 33⅓ per cent, so that the average fee for this purpose would be reduced from $15.00 to $10.00. The legislature, however, made a slight change in this plan. The bills which were finally

passed provided for a $2\frac{1}{2}$ cent tax on gasoline and provided that the revenue from such tax should be used for the payment of bond interest and sinking fund charges on state road bonds, and for the maintenance of state highways. The act is based upon the revised act of New Mexico, in keeping with the recent decision of the United States Supreme Court in the New Mexico case. Instead of reducing the rates on motor vehicle licenses $33\frac{1}{3}$ per cent, the legislature provided for a reduction of 50 per cent, which will, in effect, provide for an average rate of $7.50 per motor vehicle instead of $15.00 as it is at present. The revenue derived from the motor vehicle tax will be used exclusively for interest and sinking fund charges on state road bonds. The provisions for the distribution of revenue derived from the operation of these two acts will result in having all of the revenue from the motor vehicle licenses applied to the payment of interest and sinking fund charges, and then sufficient revenue from the gasoline tax will be used to make up any deficiency in the amount necessary to pay for the interest and sinking fund charges, and the remainder of the revenue from the gasoline tax will be used for the maintenance of state roads. These acts will go into effect immediately.

The corporation license tax provided that all corporations except insurance companies doing business in the state should pay an annual license tax based upon the authorized capital stock of the corporation according to the graduated scale, but the rate per thousand dollars decreased as the authorized capital stock increased. The commission recommended that this be corrected so that the small corporation would not be taxed more heavily per thousand dollars of authorized capital stock than the large corporation. A bill covering this was introduced in the early part of the legislature, and after numerous amendments, was finally passed in such a form that it will increase the rate per thousand dollars of authorized capital stock of those corporations which in the past escaped so easily.

The limitations of levies was proposed in the senate in the early days of the session. In brief, the proposed act provided that no taxing unit should levy an amount for the year 1923 which was in excess of the amount levied for the year 1922, unless upon proper showing it could be demonstrated that an emergency existed and that such levy was justified. It also provided that if it could be shown that an excessive levy was made the year previous, that such levy could be reduced to an amount which, in the opinion of the central body, was not excessive. The act provided that a central body known as the state board of review, composed of the members of the state board of equalization and the state auditor, should administer the act and investigate all levies and make their conclusions effective. The act also provided that in case the taxpayers of any district were dissatisfied with the findings of the state board of review that the question of the levy could be put to a vote, and if voted upon favorably by the people within the district that such a levy should become effective. This proposal met with a great deal of popular approval. There was some question as to the constitutionality of the proposal however. It appeared that the legislature had full authority to limit local levies, but there was some question as to the power of the legislature to delegate such authority to a central body. The act was opposed vigorously in the senate and was amended in such a way that its very purpose was lost, and finally a substitute was introduced which provided that all taxing units should submit their levies to the state board of equalization and that the state board of equalization should examine such levies and notify the county attorney of any county in which a levy had been made in excess of the levy permitted by law. This substitute was passed in both houses but has not yet been signed by the Governor.

The recent action of the county sheriff of Salt Lake County in enforcing the anti-cigarette law which was enacted two years ago forcibly brought the attention of the solons to the inconsistencies of the act and an examination of the tobacco business gave them the suggestion that an act might be devised which would do away with the present cigarette act and provide a measure which would secure revenue from the sale of cigarettes. The original act as it was introduced was based partly upon the Iowa law and provided for a tax upon all cigarettes sold in the state of Utah. The revenue from such tax was to be covered

into the state general fund. The act met with general approval, and after a few amendments were made it was passed and was signed by the Governor last night. The act provides that no person shall sell cigarettes until a permit has been issued, and that no permit shall be issued until the applicant shall have paid to the treasurer of the city, town or county, as the case may be, an annual license fee as follows:

In cities of the first class	$100.00
In cities of the second class	75.00
In cities of the third class	50.00
In towns or other territory	25.00

Such vendors of cigarettes are required to pay into the state treasury a tax upon the following basis:

On cigarettes weighting not more than three pounds per thousand, 1 mill on each cigarette.

On cigarettes weighting more than three pounds per thousand, 2 mills for each cigarette.

On cigarette papers and wrappers, one-half cent for books of fifty or less; one cent for books more than fifty but less than one hundred, and one-half cent for each fifty papers or fractional part thereof.

There was considerable agitation for a reduction in public expenditures, but for the most part it took the form of proposed plans for reduction in salaries, which would have about the same total result as the proverbial firing of the office boy. The total result of this, however, was practically *nil*. The board of equalization was under fire for some time but no damage was done except in the appropriations.

Tennessee. The Tennessee legislature has enacted an excise tax law imposing a tax of 3% upon the net earnings of corporations and joint stock associations arising from business done wholly within the state, but excluding the earnings derived from interstate commerce. The Tennessee manufacturers association has already advanced a contention that goods shipped from Nashville to Chattanooga will be exempt from this tax for the reason that the ship touches another state before reaching its destination. It would appear on the surface that there is something wrong with the drafting of this measure if such an exemption may be allowed. A gasoline tax of 2 cents per gallon has also been adopted.

Kansas. Secretary Simmons of the Kansas Tax Commission writes that the legislature has voted to re-submit to the people the constitutional amendment authorizing the classification of property for taxation. This amendment will be voted upon at the next election.

Vermont. Tax Commissioner Fred B. Thomas reports that a gasoline tax of one cent per gallon has passed both houses of the Vermont legislature. A bill fixing the license fee for automobiles on the basis of weight at eighty-five cents per hundred with a minimum fee of fourteen dollars, and a motor cycle fee of $7.50 has passed the house. Other proposals include a tax of intangible property of three mills, and a tax on salary incomes at 2%. Strong opposition is developing against another proposal for tax on income from intangible property at 6%, and practically all other property at 2%, with little likelihood of passage.

Ohio. The Ohio legislature has passed three taxation measures, and has rejected decisively a fourth. The defeated bill was a gasoline tax. Of the three measures approved, one provided for the removal of the restrictions set up by the widely advertised "Smith One-percent Law" of 1911, and the substitution of higher tax limits; another provides a penalty of 10% of the value of property not returned for taxation in the current year, with an additional penalty of 2% for each preceding year in which such property was not returned; the third replaces the county auditor as the chief assessing officer by a county assessment board of three members, composed of the president of the board of county commissioners, the county prosecuting attorney, and the county auditor. The object of the last two laws is to bring the owner of intangibles between the upper millstone of higher tax rates and the lower one of more strict administration and confiscation of unlisted property.

FOREST TAXATION

Mr. Louis S. Murphy, Forest Economist in the Forest Service, United States Department of Agriculture, sends the following comments on the plan of forest taxation submitted by the Association's committee at the Minneapolis Conference:

"The leading editorials in the January and February (1923) issues of the *Bulletin* point out rather convincingly the desirability of incorporating into the Model Tax Committee's program a provision for some sort of property tax on intangibles. The various arguments supporting this contention apply with even more force to growing forests in the program of the Association's Committee on Forest Taxation as presented at the Minneapolis conference last September (1922).

"Taking the Association's Model Tax Committee's program as a basis for its proposal, the Forest Tax Committee recommends that the bare land and the forest when it has reached maturity be taxed under the property tax, and that the income from harvesting the forest crop be taxed through the personal income and business tax levies, as recommended for all similar personal and business incomes. The nigger in the woodpile is to be found in the property tax on the forest 'when it has reached maturity'.

"Except for the mature forest growth standing on the land when such a program went into effect (which growth thereupon would be cut off as quickly as possible to avoid further taxes), all or practically all forest growth subsequently brought to maturity would entirely escape being taxed under the property tax. Maturity at best is only a very relative term. No workable standard could be set for determining it which any timberland owner could not anticipate, and cut and market his forest growth just before any property tax would legally fall due.

"Forests even while growing are unquestionably tangible property, and so long as a tax upon tangible property is levied there is no logical justification for completely exempting even growing forests from it. There is, on the other hand, abundant justification for attempting to limit both the gross amount of tax to be borne by growing forest and the time and manner of its collection.

"It can be shown that in proportion to the gross returns yielded by forest property the present method of property tax levy upon forests while growing imposes an excessive and sometimes a confiscatory tax burden. This situation is in a measure similar to that of intangible property when taxed by the usually general property tax methods. In one case, a special low rate intangible property tax has been decided upon as a fair and equable solution of the difficulty. In the other, it has been deemed best, heretofore at least, to tie the property tax up directly with the yield or income realized, making the substitute for the property tax a definite percentage of the stumpage yield.

"Now, however, the Association's Forest Taxation Committee states very definitely its abandonment of any idea of a yield tax as a substitute for the property tax upon forest growth. It says in this connection: 'The simple solution becomes practicable and not unduly burdensome; i. e., the annual tax on the land only at the regular rate of the property tax, with the entire exemption of growing trees. No additional yield tax (upon the forest growth) is required so far as the property tax is concerned. . . . The yield tax would appear, not as an additional tax in lieu of the property tax, but in the place of the business tax.'

"The inference to be drawn from this is that in states having no personal income or business taxes only a bare land property tax will be levied. Even in states having both personal income and business taxes these taxes apply equally to the farmer, butcher, manufacturer, merchant, and realty owner, as well as to the forest owner, yet none of these taxpayers would enjoy the exemption from all tangible property taxes save only that upon their bare land values which the committee proposes for forest-producing property.

"As already stated, there would seem to be little or no justification for the complete exemption from property taxes of

growing forests. These represent in large part productive, invested capital. This would be perfectly evident if our forests were so handled that only so much wood volume was cut from a forest each year as was put on by the growth of the whole forest during the previous year. It would then be possible to say 'So much is invested capital, or growing stock.' 'So much is increment, or crop yield.' With our forests in the haphazard condition they are at present this separation is not feasible.

"It is feasible, though, to levy upon the income from the product as it is harvested (i. e., the stumpage) a tax which will represent a fair and equable equivalent of a property tax upon the invested forest capital (i. e., growing stock) which produced the income (i. e., stumpage). Such, in principle, is the yield tax. It is not, as is often contended, an added tax burden levied directly upon the crop itself, but an indirect tax upon the invested forest capital. As such it finds its justification in not overburdening the forest capital while it is being built up to its full productive capacity during which time little or no revenue can be realized.

"A bill to put the program of the Association's Forest Tax Committee into effect is, presumably, now before the New York legislature. Since the state already has the personal income and business tax, the only change necessary was to exempt growing forests from the general property tax. The amendment as proposed, however, goes even a step further and exempts 'all natural and planted forest growth.' Existing mature forests, as well as growing forests, are thereby also exempted. This is the extreme of liberality which few states other than New York can be expected to follow.*

* See further discussion in *Journal of Forestry*, Jan. 1923, p. 25, Vol. XXI, No. 1.

ECONOMY AND RETRENCHMENT IN NEW YORK*

Senator Frederick M. Davenport's Committee on Taxation and Retrenchment has just published another section of its report. This report deals with local government in New York State. We reprint herwith some paragraphs from the summary of findings and recommendations.

"In presnting a brief outline of the Committee's findings and recommendations, we wish to have it understood that it has not been possible, within the limits of time and resources available, to make a complete study of all factors affecting the question of local government in the State or to arrive at final conclusions and recommendations. The detailed field study of conditions has been confined primarily to six counties — Albany, Erie, Franklin, Steuben and Sullivan; to selected towns in other counties, and to certain matters in Rockland, Ulster, Greene and Westchester counties. It should be noted that the five New York City counties are not included in this study and that no conclusions or recommendations are made with regard to them. No field study was undertaken in the cities. The material we present on city government is drawn from special reports prepared by the cities for the Committee and from the Committee's conferences with city officials.

The tentative conclusions arrived at on the basis of these samples have been examined in the light of the information furnished to the Committee at its hearings by state, county and local officials from all sections of the State.

SUMMARY OF FINDINGS

On the whole, town and county government in the State of New York is not working satisfactorily. The following evidences of inefficient and businesslike organization and methods may be cited as typical:

The laws which deal with local government are in an extremely unsatisfactory state, and as a result some localities are operating under laws which have long since been repealed or superseded and public officers are collecting fees in excess of those permitted by law.

* Extracts from the report of the Special Joint Committee on Taxation and Retrenchment, February, 1923.

Most counties and towns have no budget systems, no adequate audit and no systematic purchasing, with the result that local finances are wasteful and chaotic.

There are assessment rolls which have been copied from year to year for a generation practically without change.

Collectors of taxes have come to the county treasurer with handbags full of tax money who did not know how much they had collected.

County and town printing is extravagant. Some counties have spent as high as seven dollars per page for the publication of the supervisors' proceedings.

The storerooms of county court houses are frequently jammed with useless undistributed official publications and reports.

The merit system is generally ineffective in the counties and there is no up-to-date system for the selection of employees.

There are no salary standards and people doing the same kind of work are receiving vastly different compensation. Some officials receive good salaries for nominal services and others receive nominal compensation for real service.

Most counties, towns and villages are inadequately protected to meet their liability as employers, while some units are securing their protection at unreasonable cost.

County, town and village payrolls have been used as a pension system for superannuated citizens.

The work of the towns and the counties on the highways is not properly related. Highways are being pounded to pieces and bridges strained by unregulated and overheavy traffic.

The justices of the peace do not generally serve as justices of the peace. They consider themselves as members of the town board.

The town constables are not meeting present crime conditions.

As a rule, lack of legal training and complete independence from control have made the coroners a hindrance rather than a help to crime detection.

The overhead cost in the smaller county tuberculosis sanatoria is disproportionately large.

It costs over a dollar for some towns to give away a dollar in outdoor poor relief.

The cost per inmate in county poor farms ranges from $200 to $400 a year, and the highest costs are not infrequently in the institutions furnishing the least satisfactory service.

These illustrations indicate some of the many defects of town and county administrative organization and practice, the inequitable and uneconomic division of responsibility between towns and county, and the general incompetence of the existing governmental machinery to control and spend public money efficiently.

In spite of the general unsatisfactory condition of local government, we have found that some county, town and village governments have made real progress. In various localities there are individual things that are being done remarkably well. Many of our suggestions for immediate reforms are based upon these successful experiments. Among them should be mentioned the budget in Erie county, central purchasing in Erie county, equalization of assessments in Erie and Jefferson counties, the transfer of the coroner's functions to the district attorney in Jefferson county, the preparation of jury lists in Rensselaer county, the administration of the poor form in Franklin county, the audit of expenditures in Erie county, the Monroe county plan for the reduction of justices of the peace and their removal from the town board, and county highway administration in Erie county. Among the towns, the budget systems of the town of Harrison, in Westchester county, and the town of East Aurora, in Erie county, deserve mention. Doubtless a more extensive examination of local government would have disclosed other notable exceptions.

The situation in the cities is by comparison satisfactory. The Committee is convinced that the cities as a whole are on the right track. They are wideawake, and through the State Conference of Mayors and Other City Officials, they are organized to improve themselves. The advances made by the cities during the last three years along the lines recommended by this Committee in 1920 are particularly gratifying.

SUMMARY OF RECOMMENDATIONS

To remedy the unsatisfactory conditions which are to be found in county and town government, various suggestions have been made to the Committee. These suggestions have come from those counties and towns

which have tried new methods, from local officials, from taxpayers, and from the consideration of the facts unearthed both in this State and in connection with our study of the general scheme of local government in other States. The suggestions are of two types, those dealing with the general system of government, and those affecting individual activities and services. The latter are too numerous to be reviewed here. All of the more fundamental suggestions have the following points in common:

a—The development of a county executive authority, such as a supervisor-at-large elected by the people.

b—The transfer to the county of certain town functions.

In one of the counties bordering on Pennsylvania it was urged that the best plan was to abolish the board of supervisors and create in its place a county commission of three to be the county executive as in Pennsylvania. Under this plan the town would be virtually abolished and its functions transferred to the county, except where a closely settled portion of a town wished to become a village or city. The remaining area of the town would be governed by the county commission.

From several counties, as well as from the charter commissions of Westchester and Nassau counties has come the second suggestion that there be elected a supervisor-at-large or county president to be the county chief executive with power to appoint other administrative officials. Under this plan the board of supervisors remains as it is, though its executive functions are transferred to the supervisor-at-large. The towns are not abolished, though all of their important functions are turned over to the county except the supervision of improvement districts. The town clerk is made the executive secretary.

A third plan follows the city manager idea. Under this plan, the board of supervisors would have all executive and legislative powers of the county. It would appoint a county manager to serve as long as he was satisfactory and empowered to appoint all of the other county officials, with the excetion of a comptroller, who is to be either appointed by the board or elected. Those who have put forward this plan have urged the abolition of the towns and the transfer of town functions to the county.

This Committee is not yet prepared to outline any complete plan of local government for the entire State of New York. We have examined local conditions enough to be confident that *a single system of organization and administration cannot be imposed upon the entire state.* It is, therefore, the judgment of this Committee that the only satisfactory method of approaching the question of improving the system of local government is to classify the counties into homogeneous groups and to draw up mandatory or optional plans of government for each group. In preparing such classes economic and geographical facts should be given as much importance as population. We believe that this is the practical and the sound method of attacking the problem of local government.

It is clear to the Committee that the present division of work between the county and the towns is not satisfactory and that we should develop a centralized executive authority in the county, in the towns, in the villages and in the improvement districts. But we do not believe that this is to be worked out in the same manner for every county or for every town in the State. In view of these conclusions the Committee makes the following general recommendations:"

Here follows a detailed tabulation of the specific recommendations offered by the Committee. The report consists of an elaborate analysis of each of these problems of local government and administration and of the data upon which the Committee's findings are based.

"In conclusion the Committee wished to call attention to the fact that the specific estimates of economies and increased revenues contained in the table above total \$2,620,000 a year. The economies to be effected by those recommendations for which definite estimates cannot be made would certainly exceed the specific economies. We wish also to call attention to the fact that the suggested economies can be made without in any way curtailing present services.

In drawing up this list of specific recommendations, it has been the purpose of the Committee to outline methods for securing eventually a better distribution of work as between the county and the towns; a better system of governmental organization in each unit, and the development of modern business methods.

THE BASIS OF PROPERTY ASSESSMENT

JOHN HARRINGTON
Inheritance Tax Counsel, Wisconsin Tax Commission

A student of taxation cannot perform a better service than to aid in setting his co-workers right if they fall into error, or be set right himself if the error is his. For every principle of taxation that is finally accepted as sound leaves us free to devote ourselves to the questions still unsettled. It is in this spirit that I beg to offer a few comments upon the article by John E. Brindley of Iowa, which appears in the March (1923) number of the *Bulletin*.

With most of the propositions advanced in Professor Brindley's article I think we need not disagree. But one proposition is stated with considerable emphasis that appears to me to be essentially unsound. In substance, the proposition is that the income or earnings from property should be considered by assessors as a basis for determining assessment or taxable value—not the sole factor, to be sure, but a major one. I quote from the article:

> "The Legislative Committee has suggested the desirability of various tax reforms, * * * * but has definitely recommended in the form of bills, only three substantive changes in the present laws: first, consideration of earnings, past, present and prospective, if any, in arriving at the actual value of property for purposes of taxation; * * * *
>
> "The recommendations that earnings be given special consideration in arriving at the actual value of property for purposes of taxation is so important and outstanding that the writer prefers to quote the exact language of the Legislative Tax Committee on this point. * * * *"

The present law of Iowa is indicated by the following paragraph quoted from the report referred to above:

> "The law at present, in section 1305 of the supplement to the code, 1913, defines actual value as 'value in the market in the ordinary course of trade'; which the courts have construed to mean the price paid and received in voluntary sales made in open marts of trade under reasonable normal conditions, excluding forced sales, and also sales of a speculative character."

This is a good rule well stated. It is clear and definite. The introduction of the factor of earnings or income would just about ruin it. By far the largest item of property subject to the general property tax is real estate. It is probably several times larger than all other forms of property combined. As is well known, there are very large quantities of real estate that are unused, or only partially used, usually held for speculative purposes. They produce no income, or only one-half, one-third or one-fourth of what they might be made to produce. This is especially true of vacant or half-used land in cities and villages, and of farming lands and platted lands on the outskirts of cities and villages. Such land will be the chief beneficiary of the proposed amendment, and will be the least entitled to the benefit; for holding land vacant, awaiting a speculative price, is evil in all its aspects. It needs no encouragement. Such land is never over-taxed.

I am aware that the Committee's report uses the words "earning capacity"; but these words serve only to open up a fertile field for argument and wrangling. The ordinary assessors, even county assessors, are not any too well versed in fundamental economics. The pressure on them to give more and more weight to earnings, or to lack of earnings, will be tremendous; and the assessor will not be able to escape from that word "earnings". If he is disposed to undervalue property, or to favor a friend, he will find the door wide open at the word "earnings". If he negligently or wilfully undervalues property, he can always make his escape at this door. He will find much property the market or selling value of which is very clear and definite, but which will have an altogether different value if based on earnings. "Earning capacity" will be still more vague; and arguments will be plentiful that if the earnings are meagre, the value should be reduced, perhaps far below market value. "Earning capacity" will prove, I am sure, to be a veritable apple of discord.

There is a way, however, to discover earning capacity if the information is required. That is, to leave it to the public—to the great body of buyers and sellers.

They know so much more about earning capacity than even the best assessors that there is no comparison. It is earning capacity, present and prospective, as estimated by the buying and selling public, that determines selling or market value. If the law requires assessors, as it does now, to adhere strictly to real market value to the best of their ability, "earning capacity" will be taken care of in the surest possible way. On the other hand, if the assessor is directed by law to investigate and consider "earning capacity" as he will understand it, an element of the greatest uncertainty, confusion and injustice will have been introduced into the actual practice of assessment; and selling or market value as a basis of taxation will be disrupted. I respectfully submit the above as my forecast.

THE TAXATION OF INTANGIBLES

EDITOR OF THE "BULLETIN,"
Sir:

I have read with a great deal of interest your editorials in the January and February *Bulletins* on the Relation of Income and Property Taxes, and agree with you that the taxation of intangibles presents a vexing problem. I have had something to do with the various attempts made in Ohio in recent years to change the uniform rule in our constitution and can testify that our biggest problem was this very question of the taxation of intangibles and the relationship between property, that is, tangible property and income.

I am glad to see your advocacy of the introduction of classification into the plans proposed by the committee on a model system of state and local taxation. To me the classified property tax presents the simplest, most easily understood and, what is most important from a practical standpoint, the most easily administered tax we could possibly impose.

After all, taxation is a most intensely practical proposition and should be as far removed from theory as possible. I have always felt that the model system of taxation which exempted intangibles from taxation entirely and offered in substitution a personal income tax as the income derived from such intangibles, was not the most practical solution of our taxation problem, at least in Ohio. One illustration: The cost of administering an income tax here in Ohio would be staggering when compared to the revenue to be derived. The great burden of complaint which has been raised against the uniform rule under which we administer our tax laws in Ohio has been that the rates imposed under it were confiscatory when applied to intangible property and the result has been a practically universal hiding of intangibles. May I point out that if we were to exempt intangibles altogether and tax the income from them, we would not thereby *ipso facto* entice all of these intangibles to come out from their places of hiding. It would be many years before the distrust and the fear of the taxpayers would be dispelled; having so easily hidden their intangible property previously, they would beyond question continue to do so even under the more reasonable rates of an income tax. Our tax officials would have tremendous difficulties in finding the intangibles and their incomes to levy their income taxes on. The old argument used by the uniform rulers that you would make a man honest by law is, I am afraid, only too true in matters of taxation.

I have advocated as the solution of our difficulties here in Ohio a combination of property and income taxes and a classification of intangible property and certain forms of intangible property. As for example, agricultural implements, household furniture, merchandise, machinery etc. In an endeavor to be practical, to collect these taxes with the least possible cost of administration and to avoid the evasion I have mentioned, I advocate a low tax on bank deposits drawing interest (of two or three mills), *collected by the Bank or Building and Loan Association.* This would compel every such deposit in Ohio to pay a tax and could not be evaded; further, I would have these taxes figured on the average annual deposit, not on the deposit in the bank on tax day; a mortgage recording tax of, say, one-half of one per cent collected by the County Recorder —every mortgage recorded in Ohio would

thereby be taxed whether owned by a resident or not (the mortgage and the income therefrom would, of course, be thereafter exempted from taxation); a graduated automobile and truck tax collected by the registrar of automobile licenses at the time of their issuance—this in lieu of all other automobile taxes, fees or licenses.

I would apply the theory of classification to the other forms of intangibles and, as stated above, to those forms of tangible property whcih have heretofore presented the greatest difficulties from the administrative standpoint under the general property tax. I feel certain that a rate of five mills on household furniture, for example, would produce vastly more revenue than does the full local tax rate today. You can't collect taxes with a club, and a two and one-half per cent tax rate is a club of formidable proportions.

If the general property tax were maintained on real estate and a few limited forms of tangible personal property coupled with classification as herein set forth with an income tax on earned incomes, I feel we would approach the ideal as nearly as possible. Our administrative difficulties would be reduced to a minimum. Expense of collection would be low and there would be less grumbling on the part of the taxpayer.

I cannot help but feel that there has been a decided reaction against income taxes because of the extreme federal rates and the harshness of federal administration. Before Uncle Sam leaned so heavily on the income tax, it was no doubt quite popular with the taxpayer. This is not true today. Low classified rates on intangibles would produce as much as high income tax rates with a vastly smaller cost of collection and would, I am sure, meet with a great deal more popular approval. I think the model tax system might very well be changed to admit of the broadest administration of classification.

W. L. Ulmer.

Cleveland, Ohio.

TAX-EXEMPT SECURITIES—THEIR RELATION TO THE TAX PROBLEM*

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Tax-exemption has existed in one form or another almost as long as taxes have been employed by governments. While some of the early exemptions were granted to persons, the first important modern tax-exemptions were granted on real property. The real property holdings of educational, religious, charitable, etc., organizations being especially favored. In the last twenty-five years, however, a change has been developing and exemptions have increased on personal property, such as mortgages, municipal bonds and capital stock of corporations.

With the adoption of the Federal income tax law, the Supreme Court rulings in a long series of decisions holding that neither the Federal Government could impose a tax on the bonds of a State and its minor divisions, including municipals, nor the States upon Federal bonds had little economic or social significance. In the first place, as long as taxes were proportional, the taxes could easily be shifted and capitalized to the amount of the tax. Secondly, practically all of the Federal taxes were in the form of customs and excise duties. Moreover, the consistent debt-paying policy of the United States left, after the national banks had fulfilled their requirements, a relatively small, amount of bonds on the open market as compared to private security offerings.

With the adoption of the Federal income tax law and the creation of the new farm credit institutions, the effect of tax-exemption has assumed an entirely different aspect. A more common ground of controversy now exists for the nation as a whole. This common ground readily explains why, even thus early in the Federal income tax legislation, the interest has been so far-reaching. The bitter controversy which has arisen in some quarters is likely to continue for some time, for any new legislation relieving the situation still seems quite remote. The authorities, whose opinion we are bound to respect in both

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parties to the controversy, are forced to admit the meagre character of the data often offered in support of their arguments. In many instances this data can probably be secured, in others, the conditions affecting the data and the complicated inter-relations of cause and effect will probably always defy statistical analysis. But this is true of almost every national problem.

CLASSES OF EXEMPTIONS

Recognizing these difficulties, let us proceed to a brief examination of some of the more important points which have been raised concerning the principles of tax-exemption. But before doing this, it is well for the reader to briefly review the list of tax-exempt securities, so that the importance which the problem has reached may be clearly had in mind.

Prior to the entrance of the United States into the European war all Federal bonds were tax-exempt. With the issue of the Liberty loans certain modifications in tax-exemption privileges were for the first time incorporated in Federal gond issues. The ease with which every reader can obtain the details concerning these exemptions hardly seems to necessitate an enumeration of the exemption privileges of the various war issues. Of the securities sometimes affiliated by investors with Federal bonds are the so-called Insular and Territorial bonds, which likewise have always had the full tax-exemption privilege. Until 1914 there was a difference in legal opinion as to the taxability of municipal territorial bonds. The decision in the case of ***Farmers Bank*** v. ***Minnesota*** (232 U. S. 516), however, removed the question of doubt concerning the status of these bonds.

State bonds and municipal bonds (including all misor divisions, and so referred to hereafter) under the rights granted to the States by the Federal Constitution are not subject to taxes; States exempt their own bonds from taxation with a considerable number of States granting complete tax-exemption to all municipal issues of the State, while other States give tax-exemptions either to particular classes of municipal issues or under particular conditions.

The recent bond issues authorized under the Federal Farm Loan Act, which are semi-private in character, are also exempt from all State and Federal taxes.

Contrary to the common belief, the majority of the States granting complete tax-exemption have done so since 1905, though a number of these States had partial tax-exemption of these issues before this date. This situation is particularly interesting in face of the fact that the agitation against exemption has developed so quickly upon the heels of the larger acceptance of the exemption privilege. This, of course, is easily explained because of the effect upon all civil obligations of the Federal income tax law. (See *Evans* v. *Gore,* 253 U. S. 245). The courts of five States, which have neither a constitutional nor statutory regulations specifically exempting the obligations of municipalities, have ruled that municipal issues are tax-exempt.

The most common form of tax-exemption of private securities is of the capital shares of industrial corporations when the corporate shares are held by residents in the State of incorporation. As these securities are practically all held locally, thus influenced by the same conditions, the advantage is fully discounted in the price, so that a new purchaser receives little or no benefit from the privilege of the State exemption.

ESTIMATES OF TOTAL EXEMPTIONS

The Federal government actuary estimated the total tax-free securities in the United States outstanding at $10,660,000,000 (January, 1922). The distribution of these issues was as follows:

State and Minor Divisions of the State	$8,142,000,000
United States (net tax-free outstanding)	2,184,000,000
Federal Farm Loan Bonds (net outstanding)	284,000,000
Bonds of Insular Possessions (net)	50,000,000
Total	$10,660,000,000

Of the above amount, approximately one-half was held by corporations, insurance, surety and bonding companies, banks, etc. As a majority of the States require that these classes of organizations hold either State or municipal obligations, a large part of the five billion dollar holdings would be in the treasuries of these companies, whether they were tax-exempt or not. This being true, a further estimate was made which placed the possible revenue to the Government from these institutional holdings, if taxed, at $35,000,000 per an-

num. The possible return from the remaining half-billion securities, if taxed, would approximate $85,000,000, or a total increase in revenue of $120,000,000.

Treasury Department regulations provide that the amount of tax-exempt securities which one individual can hold in addition to the pre-war issues and the 3½ per cent and 3¾ per cent notes of the Liberty issues is $160,000. To these holdings should also be added the tax-free Federal Land Bank bonds as well as all State and municipal issues.

LARGE STATE ISSUES

The increase in State and municipal issues, which are all tax-free from the income tax, offers the most important problem of the tax-exempt bonds. As will be observed from the table below, the growth has practically doubled since the war and trebled since 1912. If the present ratio of increase continues, the outstanding State and municipal issues, it has been variously estimated, will total from fourteen billion to seventeen billion dollars in 1926 when the majority of the special tax-exemption privileges of the Federal bonds will expire. These estimates do not include the Federal Farm Loan bonds which are also rapidly increasing.

INCREASE IN STATE AND MUNICIPAL SECURITY ISSUES (in millions)

	Long Term	*Short Term*	*Total*
1912	$399.0	$192.4	$591.4
1913	408.4	483.2	891.6
1914	445.9	286.0	731.9
1915	492.5	154.2	647.3
1916	497.4	292.4	789.8
1917	444.9	392.4	837.3
1918	262.8	473.1	735.9
1919	770.1	450.0	1,220.2
1920	773.6	664.0	1,437.7
1921	1,304.2	716.1	2,020.3
1922 *	1,039.9	210.6	1,250.5

Examining the growth of the increase of output in securities in light of the National Industrial Conference estimates in 1921 gives us some idea of the burden this increase, which is now at about the rate of one billion dollars a year net, means. The amount of national income available for taxes and new capital (1921) was estimated at $12,500,000,000. Taxes of all kinds required $8,400,000,000, leaving $4,100,000,000 for capital requirements with a need of $6,000,000,000.

* Nine months.

Again, comparing the previous table, representing the growth in State and municipal issues, with the table following, which represents the decrease in the number of taxpayers having incomes over $300,000, the logical inference is that some relation must exist between the two. Particularly does this conclusion seem warranted when in the face of this decrease the total taxes of the country have increased. Many will immediately reply that this decrease was caused by the losses following the after-war depression. This might be offered as a partial explanation, but it does not explain the steady and uninterrupted decrease from 1916 through a very prosperous period.

DECREASE OF INCOMES OVER $300,000

(Latest Available Treasury Report Figures)

	Number of Returns		*Amount of Net Income (in millions)*	
Year	*All Classes*	*Over $300,000*	*All Classes*	*Over $300,000*
1916	437,036	1,296	$6,298.5	$992.9
1917	3,472,890	1,015	13,652.3	731.3
1918	4,425,114	627	15,924.6	401.1
1919	5,332,760	679	19,859.4	440.0
1920	7,259,944	395	23,735.6	246.3

On the other hand, the Secretary of the Treasury has indicated an increase in the use of other deductions which would also cut down net incomes. These deductions, however, can be applied to all other incomes as well. The forms of these deductions are: (1) deductions of losses on sales of capital assets, with the failure to realize capital gains; (2) exchange of property and securities so as to avoid taxable gains; (3) exchange for nontaxable securities, and (4) other avenues of escape, such as the division of property, the creation of trusts and the like. In no instance, however, is it assumed that all tax-exempt securities are purchased by those having incomes over $300,000, though an increasing amount has been taken by this group every year.

Indeed, would it not seem strange if a legitimate way were open to an individual and he did not make an attempt to lighten the burden of his taxes? The easiest way to accomplish this is in the purchase of tax-exempt securities. But apart from the justification of the citizen to seek this method of escape, is it economically and socially sound from the standpoint of the

State and its responsibility to its other citizens? Though recognizing the constitutional and practical difficulties confronting any change, space will only allow a brief examination of the more important social and economic arguments involved. For the same reason also only a limited amount of data can be offered in support. But a statement of the case can be made.

THE ARGUMENT

I. The strongest single argument which has been brought against tax-exemption is its nullification of the purpose of the Federal income tax law. This law was adopted on the theory that taxes could be most effectively levied in their present form to carry out the principle of the ability to pay. With this in mind, the progressive rates were adopted, thus placing the heavier tax burden, as supposed, on the individuals with large incomes. Tax-exemption is defeating this purpose, as we already know, by permitting the individuals of large incomes to purchase tax-exempt securities, thus escaping all taxes and forcing an increased tax burden upon those less able to pay and upon capital employed in private enterprise. Earned income instead of unearned income which should bear the major taxation is obliged to shoulder the increasing burden.

The advocates of tax-exemption, without exception, point to the fact that the advantage of exemption will not begin to operate until the surtax has reached a certain amount and this will vary with the changes made in the rates. No opponent of tax-exemption will deny this claim. To the contrary, it gives support to the whole contention that a "privileged class" is created which is exempt from all taxes—the class best able to pay. What can be more opposed to the sound canons of taxation and strike more insidiously at the principles of sound democracy than the recognition of a privileged class?

If an equal exemption privilege was afforded to persons of all sizes of incomes there would be some defense, though obviously equal exemptions would mean no privilege to any class. Where a graduated tax rate is used and tax exemptions allowed, unequal advantages are realized and the value of the privilege increases with the size of the income. Thus the small taxpayer is penalized in favor of the very rich who may care to exercise this privilege—and would he not be foolish not to? But as stated elsewhere, this does not argue that the present scale of surtaxes is not justified. If the present tax-exempt securities were taxed, it would permit of a lowering of the present surtax of rates.

Under the present operation of the income taxes, the small investor has practically nothing to gain in the purchase of tax-exempt municipals. If his income, for example, is exactly at the minimum exemption point of the income tax, it will make no difference whether he buys a 4 per cent bond at par or a 5 per cent bond selling at a premium and netting 4 per cent. But as an individual's income increases, so in ratio do bonds with the tax-exempt privilege become more valuable to him.

II. The common confusion about tax exemptions of the income from real property and the income from securities, where the latter is taxed under a progressive rate, is caused by the failure to distinguish between the character of the taxes. The tax on real estate which has been so firmly fixed in our reasoning on taxes is a proportional tax while the present income tax is a graduated tax.

Furthermore, if expenditures are made by the State, obviously the tax must be paid, so that while the farmer may obtain cheaper rates on the money borrowed under the Federal Farm Loan Act, a larger tax will have to be paid on real property to meet the State's assumed obligations. Consequently between the shift made here and the increase resulting from those who do not pay any tax because their income is realized from tax-exempt securities, a very large increase in taxes will result in all other classes of property.

The advantage, as yet, of tax exemption on Federal lands to the farmer is small and through the shift of tax burden to land tends to maintain high rents. The estimated aggregate of farm mortgages for the country is $8,000,000,000, but the tax-exempt bonds under the Farm Loan Act amount to less than $500,000,000, or approximately 85 per cent of the money advanced to farmers is still competing with tax-exempt securities. Higher rates must correspondingly be paid by the farmer for his money. Real estate of all classes which constitutes approximately 35 per cent of

the total wealth of the country is paying about 70 per cent of the taxes, and yet what does either the average small home owner or farmer gain as a holder from tax-exempt securities? Neither of these two classes of indiivduals own them.

III. With the extraordinary high surtax rates, it is argued that the rich man should be given some source of relief. To accept this argument unqualifiedly means a class distinction and an unequal chance of escape. Class relief, no one need argue, is unequitable and runs counter to the principle of the ability to pay.

Though the present high surtaxes may drive a great many wealthy taxpayers to purchase tax-exempt securities, it does not follow that this is a sound argument in defense of tax exemption. As to whether or not the surtaxes are too high, as based on the theory of the ability to pay, no one has yet offered sufficient evidence to substantiate his argument either way. But those defending tax exemption on the ground of too high surtaxes fail to recognize that the present high surtaxes would not have to be maintained if all the present exempted securities were taxed.

If the increased output of tax-exempt securities is continued and they are obsorbed by the group of individuals receiving the upper range of incomes, tax reductions for those who cannot escape do not seem immediate. As already suggested, those who do pay must pay more, as has been realized by every householder for the last five years. A casual examination of tax increases quickly reveals the seriousness of the situation. The Federal tax burden per man, woman, and child in 1913 was $7, and in 1921 had increased to $41, and local taxes for the same dates had increased from $17 to $37. With pensions, the care of soldiers, interest and amortization of war debts, there seems little chance of very much reduction in Federal taxes in the near future. Reductions could, however, be made in State and local taxes, though the increase in local indebtedness gives little immediate hope for relief in the heavy taxes now prevailing.

IV. With the undue advantage which the various tax-exempt securities have in the market, an embarrassing situation is created for all regulated companies, such as railroads, electric light, gas companies, etc. All public utilities are regulated by statutes and commissions as to the rates which they can charge for their services, and thus incomes cannot be easily adjusted to meet new interest charges. With the new capital needed every year, the utilities are handicapped because of the unequal competition with municipal issues they must meet to secure this capital. Public utilities will consequently more and more be forced to secure their capital from the very small investor. This will often be difficult, especially where an industry needs from $1,000,000,000 to $1,500,000,000 capital a year. Desirable as the customer ownership form of the distribution of stock may be, it may not always be an adequate source of funds where a large expansion must be made. The cost of selling securities to small investors also materially increased the cost of distribution. Also an unduly large proportion of stock will have to be issued for which higher rates must be paid.

HANDICAPS PUBLIC UTILITIES

If public utilities must continue this unequal competition, government ownership will result. Whether one favors government ownership or not—a forced ownership cannot be looked upon with favor. "Cheap money" borrowed under these conditions of government ownership will without doubt prove a boomerang and become very "dear money". The extravagance in management, which but few doubt would probably ensue, would call for larger amounts of money. Further, if public utilities are forced into public ownership and their securities are exempted as those of the Federal Land Bonds, taxes will have to be increased elsewhere, so that again the citizen who now is not included in the tax-exempt list must pay still more taxes. If an increased amount of funds might also be needed to provide for extravagances in management, the situation becomes that much worse. The reader will find the story of the public utility fight in California and the far-sightedness of public utility managers in fore-seeing the effect of future tax-exemptions both illuminating and instructive.

V. A well-known organization recently offered a resolution imputing that those arguing for the elimination of tax-exemption were contending that this meant a withdrawal of capital from productive

industry. A twisting of a phrase is apparent here in order that a basis for a point in argument might be established. No one would attempt to defend such a nonsensical argument. To make this possible, the Government raising funds by bond issues would have to lock up the money received in its vaults and refuse to use it for any purpose.

SURTAX EFFECT UNCERTAIN

But to argue that unfair competition does not exist between a security which is taxed and one which is not taxed is quite a different affair. That difference in the price of securities based upon different equities will always exist, unless supported by some artificial means, goes without saying. Furthermore, over the long period a security price which is not restricted by some artificial factor will always tend to level up to other security prices possessing equal investment value. Also, if a charge as a tax is levied and the tax is constant and levied upon all securities alike, the tendency is for the market price to adjust itself to this added burden. A charge against a particular class of securities and not against the other securities in the market would create an artificial market and the adjustment would be accordingly unequal. Taking another form of variation such as that created by a tax-exemption privilege with both a normal tax and a progressive surtax operating, the security price would not discount the total tax beyond the normal rate to which all purchasers were subject. The effect of the surtax cannot be known, as it is not known whether a purchaser with an income of $20,000 or $300,000, or some other income, will buy the security.

VI. In the exemption of Farm Loan Bonds, a class privilege is extended to a semi-private industry. The gravest danger lies in the precedent which has been established. If the present privilege of exemption is to be continued, other forms of quasi-government bond issues have the same right to demand exemption. Why should not the city home-owner, railroads and public utilities have the same rights? If the farm bonds have a legitimate reason for being exempted, the railroads can argue that we need exemption for railroad bonds in order to keep freight rates lower.

Taxes, it is answered, must be met—but why should the securities of one quasi-institution more than those of another be privileged?

VII. When an agency is given an undue advantage, it usually leads to extravagance in management. This has been particularly true in government control. The constant shift in personnel and frequent incompetency add to this possibility. What is to be expected in management when legislatures grant expenditures beyond any reason? For illustration, a road bond issue was sold in recent years having a tenure of fifty years—a part of the road constructed cannot at the most last more than fifteen years. Can you believe that the officials charged with the expenditures of those funds would be any more restrained in their management of the funds?

VIII. Another argument for tax-exemption is that it is an advantage to the Government in marketing its securities. The experiences of Canada and England do not support this claim. Some have maintained that while ordinarily this advantage should not be given, the privilege should be retained and used, if needed, in war emergencies. If the elimination of tax-exemption is sound there would seem to be no argument for this contention. An unequitable advantage would be granted to the Federal Government over the State which cannot be defended.

POSSIBLE REVENUE GAINS

IX. What the increase in government revenues would be if all securities now exempted were taxed is problematic. At best, both parties are on doubtful ground here, for all calculations made in defense of increased revenues or lower revenues have to be based on assumed figures. The amount to be gained in taxing all tax-exempt securities has been estimated from $100,000,000 to $300,000,000. The increase in the rate that the Government would have to pay on its bonds would also necessarily make a considerable difference as to estimated gain to the Government. The increase on Government securities rates for money, if all Government, State and municipal bonds were taxed, has been estimated at from ¼ to 1 per cent. The major evidence in these estimates has shown rather large gains to the Government.

The State of New York Chamber of

Commerce in its recent report opposing the abolishment of tax-exemption of securities assumes certain distribution of income taxes paid as a basis to show that no advantage would accrue to the Government if civil obligations were taxed. But even after they " get right down to figures and follow the operation clear around the circle" in order to show up " the superficial reasoning on the subject"—they are forced to use hypothetical figures in the attempt to prove their case. At best they are guesses which no one has yet proved. On the other hand, those who have advocated the elimination of tax-exemption have been equally guilty.

ASSUMED FIGURES DECEPTIVE

But if we should assume the New York Chamber of Commerce to be correct, what is the situation? They acknowledge that an advantage does accrue to the individuals with incomes above a certain range who invest in tax-exempt securities.

Let us also go as far as to assume that the Government would receive no net gain —would this be a sound defense for granting a special privilege to a particular class? Again, grant their claim that those who claim tax-exemption to be economically unsound have used superficial argument—why has no substitute principle of taxation been offered? Anyone familiar with the simplest aspects of the tax problem recognizes that some underlying principle or basis of taxation must be accepted. Even if figures are used, as is claimed, as the sole basis for argument in the report— must not some general principle of taxation be deduced upon which to operate? A studied effort to avoid a discussion of theory was probably made but it leaves the reader in the position of uncertainty as to the organization's basis of reasoning.

Figures, as also claimed, do belie superficial argument. But figures upon which they place their whole argument and cleverly build these assumptions are merely assumed figures. How do we know that these assumed figures give us the truth in the matter? Other figures might be assumed here with equally good authority which do not show the same results. Furthermore, every authoritative statistician will tell us that all figures to have value as evidence must be interpreted in the light of sound principles.

TAXATION OF MOTOR VEHICLES AND GASOLINE

The related subjects of motor vehicles and gasoline taxation have received attention in a number of the reports of special commissions and the following symposium of the views expressed indicates the present trend of sentiment on these questions.

The Michigan Committee of Inquiry into taxation reporting in 1923 discusses the taxation of gasoline as follows:

" There is a well-developed sentiment throughout the state for the specific taxation of gasoline, the reason being the heavy call upon the pocketbooks of the people to meet the expense of road construction and maintenance. It is claimed that inasmuch as the motor vehicle is the great user of the public highways and is largely responsible for the rapid progress in road-building and the consequent heavy tax levy to pay for them, the owners of motor vehicles should be called upon to pay a little more than they are now paying toward the cost of maintenance of the public highways. On the other hand, there is a sentiment among the owners and manufacturers of motor vehicles that the motor vehicle industry is paying now more than its fair share of the public tax burden and that it would be discriminatory and unjust to impose a further tax by way of a tax on gasoline used by motor vehicles. The committee cannot help but feel, after having heard arguments for and against such a tax, that the matter has been looked at somewhat from a selfish standpoint rather than from the standpoint of the common good. The construction and maintenance of our public highways involves a tremendous expense which must either be met by a tax upon the general property of the state entirely or in part by a tax upon the instrument of travel mostly used over the highways of our state. The fact is that motor vehicles are

largely responsible for the large outlay for road construction and maintenance. The manufacturers and owners of motorvehicles are the prime movers in forcing rapid road construction and it cannot be denied that they are the principal users of the public highways, and consequently are, in a large measure, responsible for the wear and tear of the roads and the consequent heavy maintenance costs. It would seem, therefore, that it would be only fair that they contribute a little more than the ordinary user of the road toward the cost of maintenance. On the other hand, we do not think that the automobile industry should be penalized for causing the building of good roads by way of extraordinary taxation; furthermore, care must be exercised in the levy of taxes upon any industry for fear of retarding industrial progress. *For this reason we believe that a tax of one cent (1c.) a gallon on gasoline would be a fair and reasonable added contribution by the owners of motor vehicles toward the upkeep of the public highways. We do not feel that such a tax will be an unwise one, or in any way cripple the automobile industry, and would scarcely be felt by the owners of motor vehicles.*

"It does not seem to make any difference to the manufacturers of motor vehicles, or to those who deal in them or use them, whether gasoline sells for twenty cents a gallon or twenty-one cents a gallon. There are just as many automobiles manufactured, sold and used with gasoline selling at twenty-one cents a gallon as when it sells at twenty cents a gallon. There is little meat in the argument that a reasonable tax upon motor vehicle fuel will interfere in any way with the motor vehicle industry.

"It is pertinent to call attention to the large outlay for road construction and maintenance at the present time in our state. Last year the state highway department expended over $17,000,000 for trunk line and federal aid construction and approximately $1,400,000 for state-rewarded roads, this latter amount being a little less than twenty-five per cent of the total cost of such roads. It expended for trunk line and federal aid maintenance nearly $1,400,000, this being approximately sixty per cent of the maintenance cost, the balance being paid by the counties. This aggregates an expenditure of nearly $20,000,000 by the state last year. There was approximately an equal amount spent by local governments upon the public highways. In addition to this huge sum of money there are annual interest charges on the present state bonded debt for highway purposes of over $1,350,000 and several hundred thousand dollars a year are spent for highway departmental administration. All this money comes from the pocketbooks of the people and it has become exceedingly burdensome, especially to the owners of real property who pay by far the heaviest part of it. Then there will have to be set aside for the redemption of the bonds a considerable sum of money each year. It is estimated by the state highway department that not less than $8,500,000 will be required by the state annually for many years to come to pay interest charges and provide a sinking fund for retirement of bonds, for state rewards, maintenance, administrative expenses, etc. To meet these charges at the present time the state receives from the license fee imposed upon motor vehicles approximately $3,500,000; the balance, therefore, will have to be raised by some other form of taxation. This $8,500,000 will be considerably augmented if the $22,000,000 in highway bonds authorized, but as yet unissued, should be issued within the next twenty years. As is known, the people authorized the issue of $50,000,000 worth of bonds for highway purposes, and of this amount $28,050,000 have been issued.

"In this connection it is pertinent to say that no loosely drawn fiscal policy should be followed in road-building. Too much care cannot be exercised in this regard. It is all well and good to build good roads to the extent that the people can afford to pay for them, but it surely is an extremely unsound economic policy to follow to build roads when the cost of them confiscates the value of farm production. From our investigation of the matter we are convinced that the Covert Road Law has resulted in doing much financial injury to the farmers of our state, and for this reason there is a popular demand in the rural communities for its repeal, or else for a decided modification in its provisions so that it will result in a marked reduction of the tax now imposed under its operation.

"There is considerable difference of opinion as to the actual amount of revenue that will be derived annually from a tax of one cent a gallon on gasoline. The state highway department has furnished the committee with a computation showing that such a tax would raise approximately $1,500,000 a year; the Detroit Automobile Association, through its representative, Col. Sidney Waldon, at one of our public hearings stated that a tax of one cent a gallon on gasoline, based on the amount of gasoline sold in Michigan, would produce approximately $4,000,000 a year. This estimate was based on information furnished by the Standard Oil Company and by the Sinclair Oil Company. From the investigations we have made we are of the opinion that the state highway department is too low on its estimate and the Detroit Automobile Association too high in its estimate. We believe the state would receive a revenue of not less than $3,000,000 if a tax of one cent a gallon were imposed on all gasoline used for the purpose of generating power."

The New York State Special Committee on Taxation and Retrenchment in its report of March 1, 1922, discusses the factors involved in taxation of motor vehicles in the paragraphs presented below:

"The factors determining wear on the roads are weight, mileage, speed, and tires, their kind, condition, and width. The factor of speed can be reached only very indirectly as it is related to horsepower and weight, and through speed regulation. Gross weight is now the basis for taxes on trucks in seven states, including New York, and for taxes on passenger cars in three. This is obviously the best measure of weight, although carrying capacity bears a fairly close relation to gross weight, and horse-power bears some relation and in case of passenger cars is more easily determined. The importance of the kind of tire has not been recognized in most state laws. The condition of tires, which is important, cannot be measured, but kinds of tires can readily be classified. The impact from solid rubber and steel tires is much greater than that from pneumatic tires. Another important element is the distribution of weight, which depends on the width of the tire and the division of total weight between front and rear wheels. This is somewhat difficult to reach by varying rates of taxation but definite limitations can be established. The most effective way of measuring mileage would seem to be a gasoline tax.

"All of these factors, excepting mileage, are considered in the uniform vehicle law endorsed by the Motor Vehicle Conference Committee.[1] The law proposes an annual fee for passenger cars and motor trucks of 25 cents per horse-power for all cars, plus 25 cents per hundred pounds gross weight for cars with pneumatic tires, 35 cents per hundred pounds gross weight for cars with solid rubber tires and 50 cents per hundred pounds gross weight for cars with steel or other hard tires, this rate to be doubled for cars used for transportation of persons for hire.[2] It is suggested that motor cycles be taxed at a flat rate of five dollars, that dealers be charged twenty-five dollars for the first five sets of plates, plus two dollars for each additional set, and that chauffeurs and owners be taxed two dollars each for a perpetual license.

"The suggested basis for the taxes on passenger cars, motor trucks, and motor cycles appeals to the Committee as being on the whole the most satisfactory yet devised and the Committee *recommends that the basis prescribed in the suggested Uniform Vehicle Tax Law be adopted by the Legislature.*

"If the proposed uniform law were adopted in New York the revenue from motor vehicles would be materially increased. The increase on five types of vehicles cited by Mr. R. K. Tomlin[3] varies from fifteen to sixty-three and one-half per cent. This should produce, on a conservative estimate, an increase of twenty-five per cent in revenue, or, on the basis of the 1921 figures, two million dollars. The doubling of the motor cycle tax would add about $75,000. The Committee *recommends that this scale of rates on pas-*

[1] A committee representing the American Automobile Association, the Motor and Accessory Manufacturers Association, the National Automobile Chamber of Commerce, the National Automobile Dealers Association, the Rubber Association of America, and the Trailer Manufacturers Association.

[2] Gross weight to be regarded as the actual weight of the vehicle plus the sum of the adult seating capacity multiplied by 150 pounds.

[3] Trend of Motor Vehicle Legislation. *Engineering News*, September, 1921.

senger cars, trucks, and motor cycles be adopted by the Legislature. The result would be a slight increase in passenger fees and a substantial increase in truck fees, especially on the larger trucks. It suggests no change in the dealer's license or operators and chauffeurs fees at this time. The grand total of all motor vehicle receipts for the fiscal year ending June 30, 1921, was $9,272,864. Under the recommended scale the yield would probably have been about eleven and one-quarter million dollars.

GASOLINE TAX RECOMMENDED

" The Committee recommends that a tax on gasoline be made a part of the system of taxes on motor transportation. A tax of one cent per gallon is now in operation in thirteen states.[4] Oregon has a tax of two cents per gallon. Two of the states adjoining New York have such taxes, Connecticut and Pennsylvania.

" The gasoline tax makes possible a fairer distribution of the motor traffic taxes than would be possible with vehicle fees alone. It appears to be the best practicable measure of the use of the roads. It makes it possible to take mileage into account in apportioning the cost of roads and it reaches the cars of other states operating in New York. An additional reason in favor of the adoption of this tax by the State is the fact that unless it is generally adopted by the states it is likely to be seized by the Federal government as a source of national revenue.

" A gasoline tax of one cent a gallon would yield in the neighborhood of four million dollars annually."

The Tax Investigation Committee of the State of Washington which reported in 1922 , offers the following discussion of these subjects in its report:

" The subject of motor vehicle taxation has come very rapidly into prominence with the growth in the number of such vehicles in general use throughout the state. There are three aspects from which the problem must be viewed. The first is the taxation of the automobile as personal property; the second is the license tax on the privilege of driving a motor vehicle over the public highways in the transportation of persons and freight for hire.

Taxation of Automobile as Personal Property:

" The state constitution requires the taxation, according to value, of all property other than that the exemption of which is constitutionally authorized. It is necessary, therefore, to continue the taxation of motor vehicles as personal property. The automobile being subject to universal inspection and always where it can be seen, one would suppose there should be no evasion of the personal property tax. We have learned in our investigations that this is far from the truth. For two reasons at least it is possible for a considerable percentage of the automobiles in the state to escape taxation altogether.

" First, the fact that all property is required by statute to be listed and assessed between the first and the fifteenth of March. It is easy for the owner of an automobile to secrete it during these few days and the assessment records indicate that this is a rather common practice. We have found also that importers of new cars make a practice of taking orders for automobiles in advance of the first day of March, but never promise delivery unless they happen to have cars on the floor or know that they can be delivered directly to the individual without subjecting the firm to the tax. This means that the great bulk of the new automobiles coming into the state arrive here subsequent to the first day of March. Naturally a car purchased after that date does not pay any personal property tax.

" Second, as the law has stood for many years, the exemption of $300 to the head of a household has not been confined to household goods. We have recommended herein that this be changed and that the exemption be declared to be upon personal property consisting of household goods and personal apparel. At preesnt this provision is the means of exempting a large number of automobiles, since those persons who own no household goods may use the $300 exemption for the purpose of exempting their automobiles. In 1921 the average assessed value of automobiles and auto trucks was only $276.48. We believe

[4] Colorado, Kentucky, and New Mexico (adopted before 1921); Arizona, Arkansas, Connecticut, Florida, Georgia, Montana, North Carolina, Pennsylvania, South Dakota, and Washington (beginning in 1921). *National Automobile Chamber of Commerce,* statement dated September 19, 1921.

that this is a situation which was not contemplated by the legislature in enacting the personal property exemption. We are satisfied that there was never any intention to protect by a tax exemption an instrument of commercial use such as the automobile. We believe further that the surest and safest way to tax automobiles effectively is to collect the license fee and the personal property tax at the same time. This can be done without changing our constitution since it involves only the manner of collecting the tax and does not affect the uniformity of the tax.

"The contention is advanced by some interests that the automobile is now paying more than its share of the taxes. With restriction of the personal property exemption and the establishment of a strong centralized state tax commission with power to compel the full and equal assessment of all property of every nature by the local assessor, the tax burden will be equally distributed to all classes of property. We are referring here to the taxation of property for the support of governmental functions, and not to the tax voted by the people or the legislature for building highways. It is entirely proper that an additional tax should be placed upon an article of personal property which is itself the cause or the medium through which the highways may be built. The modern permanent, hard-surfaced highway has been largely the result of the demands of the automobile owners. Indeed, without the automobile this type of highway would still be regarded as an unwarranted extravagance. These roads are in such a peculiar degree for the use and enjoyment of the autoists as a class, that special taxation of these vehicles for highway purposes is entirely justifiable.

"We recognize that in another sense the entire public benefits from these improved highways, and all taxpayers are now meeting the obligation herein implied through the payment of the general tax levies for road purposes. The automobile as a form of personal property should contribute to this purpose, and our recommendation for the collection of the property tax on motor vehicles is designed to insure a better distribution of the property tax to all owners of such property.

License Taxes on Automobiles:

"The case for the taxation of the automobile in a special manner in order to provide and maintain the type of highway required for modern motor transportation has already been stated. We have considered the scale of license fees now imposed on automobiles and motor trucks and have decided to make no recommendation looking to a modification of these rates.

The Automobile as a Public Utility:

"The development of any new community, territory or country depends on transportation for its present existence, its future, and its continued prosperity. Transportation is the backbone of all activity; without it progress must stop.

"When the northwest was first thought of as a possible empire, men with brains conceived the plan of building cross-continental railroads into the heart of what was then an unknown country. The project included the State of Washington. The federal government, realizing the necessity for railroad communication and transportation, granted both the Northern Pacific and the Southern Pacific railroads vast tracts of land to create a value upon which the promoters might erect a financial structure. Capital was secured and the railroads were built. The great northwest came rapidly into possession of its natural resources and soon made itself felt in the Union.

"Automobile transportation began in a small way. Individual owners of automobiles carried passengers for hire. Individual owners of trucks hauled freight by the ton over the highways built at public expense, until at the present time we are building highways with the general tax money, twelve per cent of which comes from the railroads as a separate class or property. We are paralleling the railroad rights of way with the finest paved roads in America. These roads are now being tied up by exclusive franchise to bus companies which operate at regular intervals between termini under statutory regulation under what is known as the certificate of necessity, found in an act entitled "Transportation of Motor Vehicles," being Chapter 11 of the Laws of 1920-21, at page 338.

"After the certificate of necessity is once secured by an automobile transporta-

tion company, it cannot be revoked except by action of the state, and no other competing concern can use that particular highway so long as this franchise remains in existence. If the patrons along the highway become dissatisfied with the service they make complaint to the public service commission, which in turn grants a hearing and determines whether or not the company owning the franchise shall operate more equipment, and when the order is so issued it shall be complied with, and in case of failure to comply the franchise is annulled. This includes the hauling of passengers as well as the hauling of freight.

" For the passenger franchise there is paid the insignificant sum of $10 for each car having a capacity of not more than eight seats; for each seat in excess of that number the license fee is increased 50 cents. The freight haul automobile pays $10 of what sum is in excess of the established wheel base weight license.

" As stated above, the highways of the state are built from the public funds and the roads are supposedly built for the general use of the public. Under the present system were an individual desirous of buying a truck and operating a freight route or a passenger route on a highway in this state. the road is closed to him if someone has already made application for the franchise. This means that the public has already gone so far as practically to build and maintain what corresponds to the railroad bed and right of way of a railroad, and it is done in part at the expense of the railroad.

" In addition to the loss of traffic by the railroad companies, Washington is losing in taxation thousands of dollars each year by reason of the constant reduction of value of railroad property. This can be met by the imposition of a franchise tax upon the gross earnings of auto transportation companies, both freight and passenger, as additional compensation for the exclusive privilege of using these rights of way. It is estimated that in 1920, a year when the business was only in its infancy, the bus business produced two million dollars of gross revenue. A five per cent tax on this volume of earnings would produce a revenue of $100,000 annually.

" In this connection the comments made by the Colorado Public Utilities Commission in defining " public convenience and necessity " as this expression is used in the law providing for the grant of motor bus franchises, should be noted. It was found that in two counties, in which sixty-eight motor trucks were operating as common carriers over the public highways, the total paid by these vehicles for the use of the roads was $819. The Texas and Rio Grande Western Railroad paid $38,023 in these counties for highway purposes and other taxes, which brought the total to $153,896. The Commission said:

" ' Public convenience and necessity, by which must be understood the convenience and necessity of the people at large as contradistinguished from the convenience and necessity of a very small number of persons who seek to derive a profit from farmers' and home-owners' investment in the roads, never contemplated that the truck driver should destroy that, to the cost of construction of which he contributed little or nothing, or that he should reap where he had not sown. When the taxing laws of this state are so amended that the truck driver operating over state highways shall contribute his due proportion to the cost of construction and maintenance of our highways, then, and only then, can this commission regard his use, under proper conditions and restrictions, of a great and tremendously expensive public facility as of equal dignity and equal benefit to the people with the moderate use thereof by the ordinary taxpayer.'

" The state policy of regulating commercial motor transportation is not yet completely developed. At present the board of public works has full jurisdiction only over those concerns which have exclusive franchises for the use of the roads. The law should be amended to give this department complete authority over all concerns and individuals who use the public highways for commercial purposes, whether an exclusive franchise has been granted or not. When this regulative step has been taken, we recommend that a tax of five per cent be imposed upon the gross earnings of all persons or concerns engaging in the transportation over the public highways of passengers or freight for hire. In the meantime, the state should collect at least enough from those using the highways for commercial purposes to cover the administrative cost of

this branch of the department of public works. This cost amounts to about $100, 000 annually and the yield of the present scale of fees is only $20,000 to $25,000 per year. We recommend an immediate advance of these fees to a level that will make this branch of the department self-sustaining, and the subsequent introduction of a gross earnings tax when the state has assumed full jurisdiction over all who use the highways for commercial purposes.

Highway Tribunals

" We desire also to call attention to another feature of the highway abuse. The auto freight transportation companies are continually hauling loads in excess of the carrying power of the roads. The highways are now provided with a police patrol, but in every case of violation of the highway laws and regulations the offender is brought before a justice of the peace for trial, and the punishment meted out by these tribunals makes the highway regulation a farce. A separate tribunal under the jurisdiction and control of the highway department is possible as a means of curing this evil. In New Jersey this plan is in operation and we are advised that it works successfully. The expenses of maintaining this separate court are more than covered by the revenue derived from fines. We recommend such a system of highway tribunals in this state in order to protect the public highways from the abuses now prevalent. If properly protected, the present style of cement road will last indefinitely, but if the present abuses are allowed to continue. these roads will all need to be rebuilt in the near future.

Tax on Fuel Oils

" This subject is perhaps the simplest of all of the means of raising taxes which your committee has studies. It recommends itself by its simplicity, by the ease with which it is collected, and by the lack of friction that it causes in the general business conditions of the community. In the very earliest stages of your committee's meetings it was apparent to the majority of the members that the gasoline tax could very possibly raise a considerable amount without doing violence or injustice to anybody. It must be borne in mind, of course, that a tax on gasoline, as on any other subject of barter and sale, must be reasonable, and the tax must not be used simply because it is an easy way of raising revenue.

" We have already discussed the problem of modern highway construction and maintenance, and we believe that it is unnecessary to expound this subject further. Everyone recognizes its importance, and the necessity of providing an adequate revenue for the purpose of building and maintainng the public highways. It is entirely proper that a considerable portion of these funds should be derived from the agencies which have brought on the modern highway problem, and we regard the tax on fuel oils as an equitable means for the diffusion of this burden. Accordingly, we recommend the advance of the existing tax on fuel oil for use in internal combustion engines to three cents a gallon."

The report of the Joint Legislative Committee on Taxation of Iowa was issued early in the current year. This report contains no discussion of motor vehicle taxation in Iowa. The general situation with regard to taxation of gasoline is summarized as follows:

" Your committee recommends a tax of one cent a gallon on all gasoline sold in the state by distributors as defined in the proposed bill, the proceeds of the same to take the place of and be in lieu of the present two-mill levy for a county road-building tax. It is estimated that the gasoline tax will produce an annual revenue of not less than $2,250,000.00. Therefore. this tax will not be in addition to presest tax burdens, but will make a reduction of two mills in the present levy on property. There are two outstanding arguments in justification of a tax on gasoline. First, the gas consumed in motor traffic bears some measure of proportion to the cost of road maintenance. and second, the large amount of foreign motor tourist traffic passing through and purchasing gasoline in the state will be thereby required to contribute some tax for the construction and maintenance of the roads they are using, just as tourists from Iowa are now obliged to pay a similar tax in many other states.

" The following data with reference to gasoline tax laws of other states has been prepared by the United States Bureau of Public Roads:

" Four states had a gasoline tax prior

to January 1, 1921. Since then, thirteen states have put such law into operation, and several other states are now considering such a tax. The seventeen states which have such a law now in operation, and the rate per gallon in each state, are as follows:

"In fifteen states, namely, Arizona, Arkansas, Colorado, Connecticut, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Montana, New Mexico, North Carolina, Pennsylvania, South Dakota and Washington, the tax is one cent per gallon at the present time. A special tax investigation committee for Washington has recently issued a report, indicating the very satisfactory operation of this law, and recommending an increase in rate from one to three cents per gallon.

"In three states, Maryland, Virginia and South Carolina, the rate is two cents per gallon.

"In the following ten states the proceeds of this tax goes into the general state road fund: Arizona, Connecticut, Georgia, Kentucky, Louisiana, Maryland, New Mexico, North Carolina, Oregon and Washington.

"In four states — Arkansas, Colorado, Pennsylvania and South Carolina—50 per cent of the money goes to the state road fund and 50 per cent to the county road funds.

"In Mississippi 40 per cent goes to the state highway fund and 60 per cent to the county highway funds.

"In Montana two-thirds of the fund goes to the state general fund and one-third to the county school funds.

"In nine states—Arizona, Georgia, Kentucky, Louisiana, Montana, New Mexico, North Carolina, Pennsylvania, and Washington—there is no distinction made between gasoline used for motor vehicles and that used for other purposes. In Arkansas, Colorado, Connecticut and Oregon, where gasoline is purchased for use in other than motor vehicles, provision is made for a refund, upon filing required evidence of fuel oil so used. In South Dakota the tax is one cent a gallon on gasoline sold for use in motor vehicles.

"The special joint commission on taxation and retrenchment for the state of New York submitted a report on March 1, 1922, in which a tax of one cent per gallon on gasoline and fuel oil is recommended, and it estimates that such tax will yield an annual revenue of $3,600,000.00."

The Oregon Committee on Tax Investigation discusses the general subject of motor vehicle taxation and presents the following summary of its findings:

"The committee's inquiry into the product of motor vehicle revenues brought out the facts stated above. Summarized, these facts show:

"1. That the revenue from the 2-cent per gallon gasoline tax is sufficient to provide for the maintenance of the present road system with a fair surplus that could be used to apply to betterment and reconstruction.

"2. That the revenue from the direct license tax on motor vehicles for 1922, and estimated for 1923 and 1924, will be sufficient to pay the bond interest and principal retirement of those years and leave a fair surplus, but that the heavy increase in interest and principal maturities for the years 1925 to 1932 indicate a considerable shortage in revenues from this source, even after allowing for reasonable estimate for increased registrations.

"That the state may be able to meet its obligations as they mature, and that the highway system may be maintained, the committee makes the following recommendations:

"1. That the revenues from the gasoline tax be segregated and set aside into a special fund to be used only for maintenance and betterment of the state highway system.

"2. That after paying bond interest and principal maturities, any surplus revenues derived from the direct license taxes on motor vehicles during 1922, 1923, 1924 and 1925 be placed in a sinking fund to be held in trust by the state treasurer for the purpose of paying interest and principal of bonds maturing in the years subsequent to 1925, in case there should be any deficit of revenue from motor vehicle licenses during such years.

"3. That maturing bonds, which cannot be retired because of shortage of funds under the present method of raising revenue, be refunded for short periods.

"4. That the present level of motor vehicle license taxes be maintained and that no changes be made which would impair the total revenues now being derived

from that source, or that may be derived from any normal increase of registrations based on the present fees.

"That the full amount of the income now being produced and which may be produced by increased registrations in the years to come will be necessary to meet the state's road bond obligations, is apparent. The committee, therefore, feels justified in recommending the continuance of the resent system of licensing motor vehicles and taxing gasoline."

DECISIONS AND RULINGS

EDITED BY A. E. HOLCOMB

INCOME, FEDERAL—REFUNDS—PROTEST NECESSARY—SECTION 252, REVENUE ACT OF 1918 CONSTRUED. — A taxpayer made his return for 1918 and paid tax thereon without protest. Two years thereafter he filed an amended return, in which he deducted a loss which he alleged he had sustained but had overlooked at the time and claim for refund was made. Without awaiting action on this claim he applied a portion thereof as a credit against his entire 1920 tax and subsequently brought suit for the balance, no action on the claim for refund having been taken within the six months' period provided therefor.

The suit was brought against the former collector to whom the 1918 tax was paid, who demurred, on the ground that as the tax had been paid voluntarily and without protest no right existed to recover in a suit brought against him personally.

The taxpayer relied upon section 252 of the Revenue Act of 1918, providing for credit or refund upon examination of returns.

The court referred exhaustively to the decisions of federal and state courts denying the right to recover taxes paid voluntarily, in the absence of statutory authority therefor and to the reason for the principle thus established as stated in Cooley on Taxation (3rd ed.), vol. 2, p. 1495.

As to the construction of sec. 252 of the act, the court held it designed solely to give the commissioner of internal revenue the power to credit or refund taxes overpaid, and to protect him in making refunds in cases where no claim had been filed or where the statute of limitations had expired. This section was not designed to concern the collector at all but to counteract the effect of section 3228 of the Revised Statutes. It gave no right to sue the collector for taxes voluntarily paid, without notice to him of any claim of invalidity of the taxes.

The court summarized the methods for recovery of taxes erroneously paid or illegally exacted to be as follows:

1. From the commissioner, under section 3220 of the Revised Statutes.

2. Through an action at law brought under the Tucker Act.

3. Through an action against a collector, who has wrongfully exacted the tax, provided the collector has been put on notice through protest and thus warned not to pay over to the government, although now, by statute, suit to recover may be brought against collectors after the taxes have been paid over (*Smietanka* v. *Steel Co.,* 257 U. S. 1; *Bul.* VII, 84).

The judgment of the lower court dismissing the complaint (280 Fed. 413; *Bul.* VII, 222) was affirmed.—*Fox* v. *Edwards,* U. S. C. C. A., 2nd Circ., Feb. 1923.

INCOME, FEDERAL—BUSINESS EXPENSES —"GENTLEMAN FARMER".—By direction of the court the jury returned a verdict in favor of the collector, in a suit brought by the executors of a decedent, a New York lawyer, who ran a farm as an adjunct to his country place on Long Island which was operated at a loss, the question being as to the legality of the deduction of this loss in computing the income of the decedent.

The evidence submitted covered only two years, during each of which there was a very heavy loss. Decedent lived in part off the farm, securing family supplies therefrom, but there was no evidence of the amount of the profits derived by such use.

The court distinguished the cases of *Wilson* v. *Eisner,* 282 Fed. 38; *Bul.* VIII, 14, and *Plant* v. *Walsh,* 280 Fed. 722; *Bul.* VII, 257, expressing dissent from the view expressed by the court in the latter case that "because the farm was conducted only for the pleasure of the owner and as

a part of his estate as a country gentleman, it was any less a business", observing that unless the occupation could honestly be said to be carried on for profit, the expense was not deductible within the statute. The question of whether pleasure was derived from the occupation was irrelevant if it was a business, and the court was unable to see the first intimation of a reason to suppose that the decedent in his lifetime carried on the farm with the hope of a profit or that if he had not got anything else out of it except the money which he did get, he would have kept on.—*Thatcher et al., Executors of Estate of Julien T. Davies* v. *Lowe, Jr.*, U. S. Dist. Ct., So. Dist. N. Y., Feb. 1923.

SALES TAX, FEDERAL — "MANUFACTURER". — A retail dealer in automobile trucks bought trucks, equipped with cabs from one manufacturer and bodies from another, assembled them and sold the complete trucks at retail. The two manufacturers paid tax on the trucks and bodies and billed the dealer for such taxes separately, which he paid to them. The collector sought to collect an additional tax from the dealer, based upon the retail price of the completed trucks after crediting him with the taxes paid by him to the manufacturers, acting pursuant to section 900 of the Act of February 24, 1919, and the Regulations issued thereunder, which defined a "manufacturer" to be one who by changes in form of an article produced a taxable article or who, by the combination of two or more articles, produced a taxable article and which contained as an illustration of a "manufacturer" one who pursued the course of this retailer.

The court held the retailer to be a manufacturer or producer; that he sold a completed truck. The fact that the other concerns did for him what a purchaser might have done, did not affect the question. He saved the purchasers the trouble of assembling and made it his business to retail the product of his purchases as an automobile truck. Thus he produced or manufactured the truck, citing *Carbon Steel Co.* v. *Lewellyn*, 251 U. S. 501; *Bul.* V, 220. The judgment in favor of the collector was affirmed.—*Klepper* v. *Carter*, U. S. C. C. A., 9th Circ., Feb. 7, 1923. See *Bul.* VII, 257.

EXCISE, FEDERAL—"BROKER".—Under the 1919 federal revenue act a tax was imposed upon brokers, which term included persons buying and selling merchandise and produce for others. The federal circuit court of appeals held that tobacco was produce and that a tobacco warehouseman whose business consisted in the acceptance of tobacco from producers, which was sold at auction to the highest bidder, at prices approved by the producers, was a broker within the meaning of the act.—*Cothran & Connally* v. *United States*, 283 Fed. 973.

GROSS RECEIPTS — INTERSTATE COMMERCE — LIEU TAX. — The United States Supreme Court has again been called upon to pass upon a question that had seemingly been rather definitely settled by previous decisions. This question was the constitutionality of a tax levied as an exclusive tax, in lieu of all other taxes, upon a corporation engaged in interstate commerce, determined by a given rate applied to its entire gross receipts derived from business in the state, including such a proportionate part of its interstate business as was applicable to the state.

The California constitution as amended in 1910 contained a series of provisions providing for such gross receipts taxes upon public utilities, among them sleeping car companies, which were taxed at a rate of three per cent, which was later changed by statute, under constitutional authority therefor, to four per cent.

The Pullman company contested the validity of these taxes, to the extent that they were levied upon its receipts from interstate traffic, and brought suit to recover payment thereof made under protest. The state court sustained the taxes (197 Pac. 346; *Bul.* VII, 61) and the cases were brought up on writs of error, the company alleging violation of the commerce and due process clauses of the United States Constitution.

The state court held that the tax was not on gross receipts as such but was both in name and essence a tax on property, the computation with reference to gross receipts being only a means of adjusting the tax to the real value of the property in the relation in which it was used.

The court observed that the principles to be applied had been repeatedly consid-

ered by it and were now settled, to the effect that a state may neither tax the act of engaging in interstate commerce nor lay a tax on gross receipts therefrom, but that the rule is otherwise as to property used in interstate commerce, which may be taxed by a state in which it is permanently located or in which it is commonly used. In the case of property which is part of a system the augmented value of such property by reason of its use as a part of a system may be taxed, although other parts be outside the state. In other words, the tax may be made to cover the enhanced value which comes to the property in the state through its organic relation to the system. These principles were announced as derived from the decisions in the cases cited, among which are the familiar cases of *G. H. etc. Co.* v. *Texas,* 210 U. S. 217; *Meyer* v. *Wells Fargo & Co.,* 223 U. S. 298; *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450; *Wells Fargo & Co.* v. *Nevada,* 248 U. S. 165; *Union Tank Line Co.* v. *Wright,* 249 U. S. 275, and *U. S. Exp. Co.* v. *Minnesota,* 223 U. S. 335.

In taxing property so situated, a state may select any appropriate means of reaching its actual or full value as part of a going concern—such as treating the gross receipts as an index or measure—and if the means do not involve any discrimination against interstate commerce and the tax amounts to no more than would be legitimate as an ordinary tax upon the property, valued with reference to its use, the tax is not open to attack as restraining or burdening commerce.

Examining the tax in question, the court found that it was clearly within the rule of these principles; it was called a property tax and was in lieu of all other taxes on such property; the state court held it to be a tax upon property; it was not claimed to be in excess of what would have been a legitimate tax on the property in question and there was no ground for viewing it as discriminating against interstate commerce.

The objection to the penalty for nonpayment — exclusion from doing business in the state — received but brief attention. This provision had not been sought to be enforced; the company had paid the tax; this provision had not been construed by the state court. If construed as covering interstate commerce it would be void. *W. U. Tel. Co.* v. *Mass.,* 125 U. S. 530, 554; *Leloup* v. *Mobile,* 127 U. S. 640, 645. The state court might construe it as confined to intrastate commerce. *St. L. S. W. Ry. Co.* v. *Arkansas,* 235 U. S. 350, 368. In neither event would the tax in question be affected.

In conclusion, the court observed that it found nothing to give support to the contention that the tax was intended to reach property or income from property situated or business done without the state, and affirmed the judgment.

This conclusive reiteration of the principles applicable to this method of taxing public activities should go far to set at rest the doubts which appear to have arisen, and should serve to define the limitations which must of necessity apply to a species of taxation which rests upon a somewhat narrow basis. Those who would apply this simple and direct method of taxation, must be satisfied to accept its limitations or refrain from its use. These principles in brief are that the tax must be fairly seen to be one intended to tax the property at its full fair value, including any intangible elements of value attaching to use. It must be an exclusive tax, otherwise the court would be compelled to undertake a burden of analysis for which it is not equipped and which it certainly would refuse to assume. The vague suggestions in recent legislation that a supplemental tax may be imposed in the way of a franchise tax, or sales tax, in addition to a tax on the property as an organic unit, and that such a tax may be measured by gross receipts from interstate commerce seem doomed to meet rejection at the hands of the court, which in the Galveston case indicated its probable attitude towards such attempts by the pertinent suggestion of Justice Holmes that while the two necessities—the right to tax the property and the inability to tax interstate business—hardly admit of logical reconciliation, yet " when a legislature is trying simply to value property, it is less likely to attempt or to effect injurious regulation than when it is aiming directly at the receipts from interstate commerce ".—*Pullman Co.* v. *Richardson.* U. S. Sup. Ct., Mch. 12, 1923.

Foreign Corporation Held Subject to Tax on Capital and Surplus.—Under the Oklahoma statutes the managing officer

of every corporation is required to deliver to the assessing officer of the county where its principal business is transacted, a statement showing the amount of its authorized and paid-in capital stock, outstanding indebtedness, names of shareholders, invested capital, surplus and undivided profit, and other information, and the state board of equalization is required to determine the amount of money, capital, surplus and undivided profits of such corporation, subject to taxation. A foreign corporation having its principal place of business in another state, but having several places in the state for the transaction of business, tendered a statement of its property within a county subject to taxation but refused to file the statutory statement above referred to, claiming that as its principal place of business was without the state, it was not required to file such statement. It was conceded that its property situated within the state was subject to taxation. The court held that the statute applied to both foreign and domestic corporations; that the corporation was not precluded from having a place where its principal business within the state was transacted merely because its principal office was in another state and that it must have some place in the state where its principal business was transacted therein. — *William Cameron & Co., Inc.*, v. *Board of Equalization,* 210 Pac. 1025.

Interstate Allocation of Capital Stock.—Under the New York statutes a minimum franchise tax of one mill on each dollar of paid-in capital stock and not less than $10 is imposed upon corporations doing business in the state, and where the corporation does business both within and without the state the capital stock is apportioned, the apportionment basis being the ratio which the real and tangible personal property of the corporation bears to its entire real and tangible personal property. A company which transacted all its business within the state and which had no real or tangible personal property whatever, resisted a tax imposed upon its entire paid-up capital stock, claiming that as it had no real or tangible personal property either within or without the state, there was no basis upon which to assess the tax, other than the minimum of $10. The court held that the apportionment provision applied only where corporations were doing business both within and without the state and that as the company transacted all its business within the state, such provision was inapplicable and it was therefore subject to tax on its total capital stock.—*Peo. ex rel. Heyden Chemical Co.* v. *Law,* 196 N. Y. Supp. 653. ,

Mercantile Corporation — Motion Picture Distributor.—A New York corporation, engaged in the business of renting and distributing motion pictures, resisted an assessment of its personal property on the ground that it was a mercantile corporation, the personal property of which, under the statutes, was exempt from taxation. The court defined a mercantile corporation to be one engaged in the buying and selling of merchandise, not incidentally but as a business, and held that the leasing of motion pictures was not such an activity as constituted the company a mercantile corporation, and that the mere fact that the company under its charter was permitted to engage in mercantile pursuits, did not constitute it such, since the test depended upon the nature of the business actually conducted by the company.—*Peo. ex rel. W. W. Hodkinson Corporation* v. *Cantor,* 196 N. Y. Supp. 855.

Special Assessments — Cost of Paving—Street Railway. — A North Carolina city by ordinance, provided for improving a street and directed that a street railway should pave between its tracks and for eighteen inches outside. The railway refusing, the city did the work and assessed the cost upon the railroad. The state court sustained the assessment and writ of error to the United States Supreme Court was taken.

The evidence showed that the length of street to be paved was two miles, with two and six-tenth miles of track; that there were 154 abutting property owners owning property of an assessed value of $5,083, 250; that the value of the railway property on the street in question was $100,000; that the total assessment for the improvement against the abutting owners was $89,909.56 and that against the railway was $102,942.30. The company itself incurred expenses preparatory to the repaving of $75,108.85; during the year preceding it showed an operating loss of $17,

388.73; its total gross earnings were $540,000 and its net earnings $147,000.

Objection to the assessment was based upon the claim that it was so excessive, unreasonable and arbitrary as to enforce it would deprive the company of due process and deny it equal protection, contrary to the Fourteenth Amendment. The state court held the facts insufficient to show that the municipal authorities acted unreasonably or arbitrarily and the Supreme Court held that it was unable to say that this was an error; that the power of the legislature to make reasonable classifications could not be denied; that there were obvious reasons for imposing peculiar obligations upon a railway in respect of streets occupied by its tracks. — *Durham Public Service Co.* v. *City of Durham,* U. S. Sup. Ct., Feb. 19, 1923.

Special Assessments — Review. — A certain Arkansas statute, authorizing condemnation proceedings for street purposes, provided for the appointment of appraisers whose determination of the value of the property taken was conclusive with no right to appeal. The statute was held unconstitutional, on the ground that the determination of value in condemnation proceedings was a judicial function, which might only be exercised by the courts and that where the legislature designated a tribunal other than a common law jury in such proceedings, the findings of fact must be subject to review by the courts, otherwise the property owner, would be deprived of his property without due process. — *Town of Hoxie* v. *Gibson*, 245 S. W. 332.

Exemptions—General versus Local Legislation — Building Exemptions.— The New York law, passed supposedly in aid of the housing shortage, under which certain types of buildings may be exempted from taxation for a limited period, in the discretion of the legislative body of any county, after having been effective for three years, has been held in violation of the constitutional provision prohibiting the legislature from "passing a private or local bill granting to any person, firm or corporation an exemption from taxation on real or personal property." It has been generally considered that New York was unlimited by constitutional provisions in taxation and this decision will doubtless come as a surprise, in view of the almost entire absence of thought of taxation as a matter of state-wide concern. It will also throw into consternation those who are said to have entered upon extensive operations, in reliance upon the exemption in question.

The court is evidently fully aware of the validity of legislation general in its form, though practically local in its operation and effect, but denies such validity when in conflict with the specific constitutional provision against tax exemption above referred to, holding that the legislation must be considered as if it exempted buildings in a particular locality or county and thus authorized such an exemption which was not operative throughout the state. The general freedom from limitations as to the taxing power is admitted, as is the power to classify for inclusion or omission arbitrarily, if a reasonable relation towards a classification is evidenced. Uniformity is not required except in the application to members of the class, but in the matter of exemption the constitution is definite in its limitation upon legislative power. Exemptions must be granted by general laws. Local or private bills of exemption are prohibited. The court does not dispute that the legislature might enact a general law exempting buildings of the character in question from taxation, but holds that the act under consideration did not do this, but exempted only those in a particular locality; the owner of a building in a single locality was accorded an exemption not shared by owners of similar buildings outside of his locality. This the court observes may be desirable but that does not justify a disregard of a constitutional limitation and considers that there is thus accomplished just what the constitution intended should be prevented.

It was argued that the exemption was not to a "person, firm or corporation"— the words of the limitation — but to all owners of a class. This the court held not a proper distinction or method of construction, and carried to its logical conclusion would justify exemption extended to two or more persons; if an exemption to persons within a class in a county were not to be held local in its operation, such an exemption might be confined to those within an assembly district or voting precinct, or a block, or a house.

The argument that the legislation was an exercise of the police power, to meet an emergency, was held not to remove it from the operation of the definite constitutional limitation.

The case involves considerations not unlike those usual in states operating under the so-called "uniform rule" in taxation, in which the question has often arisen whether that rule may not be broken through the omission to tax — or through exemption — as well as through non-uniformity in the exercise of the power of taxation. The decision on appeal will be watched with interest, although the niceties in distinction between "general" and "special" laws make it seem doubtful if a clean-cut decision of the tax principles involved may be anticipated. Aside from the possibilities in this direction, it would appear difficult to dispute the soundness of the conclusions.—*Hermitage Co.* v. *Goldfogle et al.,* N. Y. Law Journal, Mch. 20, 1923, p. 2081. [Reversed by Appellate Court, Ap. 6, 1923.]

Exemptions — Federal Land Bank Mortgages. — The Alabama mortgage recording tax has been held uncollectible upon mortgages to federal land banks. The state court had sustained the tax (93 So. 7; *Bul.* VII, 266) and the case was taken to the United States Supreme Court on writ of error. That court rejected the state court's ground that payment was optional as recording was optional, observing that the case was not so simple as that; that the law practically made it necessary to record, and while the bank had a choice, so had one who acted under duress. The fee was imposed in addition to the charge for registry and was thus frankly recognized as a tax and was held applicable to mortgages which the state was not at liberty to tax.

To the suggestion that the lender could collect the money in advance from the borrower and thus escape the tax, the court replied that this did not make any difference; the statute required the lender to pay the tax, but "whoever pays it, it is a tax upon the mortgage and that is what is forbidden by the law of the United States."—*Federal Land Bank of New Orleans* v. *Crossland,* U. S. Sup. Ct., Mch. 19, 1923.

Exemption—Indian Lands. — An Indian purchased real estate with funds which were held in trust for her by the federal Indian superintendent and which were derived from the sale of restricted lands which had been allotted to her and were exempt from taxation. A notice signed by the Indian superintendent was attached to the deed reciting the source of the funds, and it was claimed that such real estate was exempt from taxation. The federal circuit court of appeals held that such real estate was not exempt from taxation, as the agent had released the funds when the purchase was made, and was not given authority to exercise control over any property in which such released funds might be invested.—*United States* v. *Gray,* 284 Fed. 103; *United States* v. *Ransom,* 284 Fed. 108.

Exemptions — Federal Securities.— A Kansas county assessor, pursuant to statute, assessed a taxpayer who had purchased some liberty bonds during the year for money owned, fixing the amount in accordance with the time that the bonds had been owned during the preceding year. The court held that the assessment was void, upon the authority of *Lantz* v. *Hanna,* 207 Pac. 767 (see *Bul.* VIII, 96), in which the statute in question was held unconstitutional.—*Western Automobile Co.* v. *Lyon.* 210 Pac. 1117.

Exemption—Charitable Institution. —The New Jersey court held that an historical society which was not bound by its charter to permit a perpetual public use of its property, was not a charitable or educational organization, and that a bequest made to it was therefore subject to the transfer tax. A bequest made to the society for the prevention of cruelty to animals was held non-taxable, such organization being a benevolent and charitable institution within the meaning of the statute.—*Pitney* v. *Bugbee,* 118 Atl. 780.

Uniformity and Equality.—The Kentucky court reduced an assessment of certain land where it was shown that it was assessed at an amount double that of the average assessment of other property in the county, although it had no greater value than the average value of such other property.

In disposing of the taxpayer's claim that the assessment was void because the board

fixed it at an amount considerably in excess of that contained in the notice, the court held that where the taxpayer appeared pursuant to such notice and had a hearing, and had a trial *de novo* in the courts, the mere defect in the notice could not deprive the assessing authorities of the right and duty upon a hearing to assess the property uniformly with other property liable to taxation.—*Castle Craig Coal Co.* v. *Laurel County,* 246 S. W. 833.

LICENSE—EFFECT OF FAILURE TO PAY.—A contractor in Kentucky failed to pay the licensee fee imposed by a municipality upon such an occupation, and such failure was interposed as a defense to a suit brought by him to recover for services performed. The court allowed the recovery and held that the license tax was not a police measure, since the occupation in question was not deleterious to the health, morals or welfare of the public; that the contract was not illegal or void, since there was no declaration in the statute making contracts made without a license void and that where the tax was imposed as a revenue measure only, without restriction as to the class of persons subject to the tax, the infraction of the ordinance consisted not in pursuing the occupation but in failing to pay the license fee before pursuing it.—*Howard* v. *Lebby,* 246 S. W. 828.

PAYMENT BY CHECK.—The Washington court held that while, as a general rule, checks given in payment of taxes did not operate to discharge them, until the checks in fact were paid, this rule did not apply where an official receipt was issued upon receipt of a check which subsequently was returned for lack of sufficient funds, and where a third party, acting in good faith and relying upon such receipt, purchased the property against which the tax in question was levied; that the county officials when they issued the receipt were acting in a governmental capacity and were estopped from asserting that the tax had not been paid. — *Seward* v. *Fisken,* 210 Pac. 378.

STATE VERSUS LOCAL CHARGE. — The Ohio constitution provides that institutions for the insane shall always be fostered and supported by the state. A statute was enacted requiring each county to pay the cost for each of its inmates in the state institution for the feeble-minded. Such charge was resisted by a county, as being in violation of the constitution. The court upheld the charge on the ground that the constitutional provision was not self-executing, and that therefore the method for supporting such institutions was left to the discretion of the legislature.—*State ex rel. Price* v. *Huwe,* 137 N. E. 137.

REVIEW—INJUNCTIVE RELIEF.—A Nebraska taxpayer sought to restrain the extension and collection of certain taxes assessed against his property, which he had listed at $200 but which the tax board assessed at $10,000. The court dismissed the proceeding, holding that the taxpayer had a plain, adequate and speedy remedy at law, by appeal from the decision of the board, of which he must avail himself.—*Hahn System* v. *Straud,* 190 N. W. 572.

BACK ASSESSMENTS.—The Florida court held that in the absence of a statutory provision permitting the back assessment of personal property which was not listed by the owner or assessed, such an assessment was void.—*State* v. *Beardsley,* 94 So. 660.

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Sworn and subscribed before me this 12th day of April, 1923. GEO. ROSS ESHLEMAN,
[SEAL] Notary Public.

(My commission expires Jan. 30, 1925.)

REVIEW

SEARS, JOHN H. "Minimizing Taxes." Vernon Law Book Co., Kansas City, Mo. pp. v—706.

The object of this interesting manual is to aid the taxpayer in the determination of tax liability. The author's interest is, of course, wholly in the lawful means by which taxes may be avoided or reduced, and he distinguishes sharply between tax avoidance and tax evasion. The title was chosen with a view to indicating that the book was written from the standpoint of the taxpayer.

The book is in two parts. Part I deals with some of the opportunities open to taxpayers to minimize present and future taxes through the proper selection of the form of business organization, the tax domicile, the forms of investment, the methods of transferring property, and in other ways.

Part II summarizes the tax legislation of the 48 states, and of the federal government. The object here is to present such an outline of the several tax systems as may serve to guide those readers who are making a choice of taxing jurisdictions with a view to minimizing their taxes. The digest is in no sense complete, but it is comprehensive enough to be useful.

The author's thesis seems sound. It is that "adoption of tax-saving methods in the shortest time by the largest number, hastens legislative correction of evils or hastens fair economic adjustment thereto." This book is a useful contribution in the field of comparative taxation, and it should promote greater uniformity and equity in tax legislation and taxing methods.

H. L. L.

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A. E. HOLCOMB, CONSULTING EDITOR

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The series of taxation measures which have been adopted in Ohio (summarized briefly in the legislative notes of the April *Bulletin*) represent the policy of property taxation by a uniform rule at its highest level of stupidity and injustice. The cities, and especially Cincinnati, were in sore need of more money and the present political group in control there lacked the finesse or the ability to persuade the citizens to support additional tax levies at election. In order to secure rural support for an increase in tax rates, the urban members of the legislature traded their support for two measures designed to enforce the uniform rule. One of these creates a county assessment board, the employees of which are under the control of the tax commission, and the other provides a drastic, even confiscatory, penalty for failure to report property for taxation.

These bills were vetoed by the governor but were later passed over the veto. In effect, they commit the state to a policy of property confiscation through taxation. The present level of tax rates in Ohio cities means a confiscatory rate of income taxation for savings deposits, moderate yield bonds with a high factor of safety, and similar investments. If these are not listed, and if the new inquisitorial system of assessment uncovers them, they are confiscated outright, up to 10% of their value, the first year. As usual, the chief sufferers will be those with moderate amounts of such property, and those whose holdings are in the hands of trustees or administrators who lack a sufficient motive for concealment. A small proportion of owners of intangibles have doubtless made a fairly full return heretofore, and some of these will continue to suffer financial martyrdom. No one who owns any large quantity of intangible property will submit to such a condition for a moment, as everyone who is at all familiar with the results of the operation of the general property tax perfectly well knows. Many owners have been engaged in withdrawing their capital from the state, or in transferring it to exempt forms under the existing level of tax rates, as the reports of the shrinkage in the personal property listed last year clearly show. The only conceivable effect of this legislation, so far as it concerns those at whom it is aimed, will be to accel-

erate the process of withdrawal or more effective sequestration.

The saving element in the situation is in the possibility that the county assessment board, as newly constituted, will not function effectively in the administration of the personal property tax. Since the members of this board are elected to other county offices and serve as assessors in an *ex officio* capacity only, it is unlikely that they will universally display great vigor and aggressiveness in bringing hidden intangibles to book. Whatever the administrative policy adopted, we are willing to stand on the above forecast of the results. The politically triumphant advocates of the uniform rule, in their futile rage over a situation for which they alone are responsible, are resorting to the measures which we have described as a means of chastising the tax-dodgers. It is significant, however, that the element which has fostered this virtuous legislation for the punishment of the evil-doer refused by a large majority to accept even a one-cent per gallon tax on gasoline for highway purposes. If there is anyone in the state with a savings account who does not immediately buy a flivver and begin joy-riding with untaxed gasoline, he deserves to have his savings confiscated. As for the economic interests of the state, let them go elsewhere for their funds, while investment houses of a certain type are reaping the harvest from the sale, to Ohio investors, of millions of dollars of questionable or worthless tax-exempt preferred stocks.

A CORRECTION

Through an error in transcription, the heavy burden of special assessments for road improvement purposes referred to in Mr. L. R. Gottlieb's article in the March *Bulletin* (p. 164) was attributed to Arizona instead of to Arkansas. We regret the slip, and extend our apologies to the author and the State of Arizona.

NEW YORK INCOME TAX RETURNS

Convincing evidence of returning prosperity is contained in a recent announcement by the State Tax Commission that the total personal income tax receipts of the State of New York for the four months beginning January 1 and ending April 30, 1923, exceed the collections for the same period in 1922 by $9,198,229.71. These figures are furnished the Commission by the Income Tax Bureau and are based on income tax returns covering the calendar year 1922 with total collections of $34,740,234.90. The total collections during the same period in 1922, representing returns filed for the calendar year 1921 were $25,542,005.19.

Commenting on the additional tax paid by taxpayers on income received during 1922, as compared with the tax paid on income received during 1921, President John F. Gilchrist, of the Tax Commission, pointed out that business conditions in general were exceptionally bad during 1921 and that the effect of this depression was inescapable in the income tax receipts during the collection period of last year, or January 1 to April 15, 1922.

"For purposes of comparison," said Commissioner Gilchrist, "some very interesting data have been prepared by our Bureau of Statistics and are well worthy of study as to general business conditions and the effect to these conditions, both past and present, on income tax payments. For instance: The total wages paid in New York State factories during 1921 was thirty per cent less than 1920, while the average drop in the cost of food in both New York City and Buffalo during the same period was less than twenty-five per cent. A comparison of the average prices of five important farm products for the two years shows a decrease of nearly fifty per cent in 1921, while the rate of sales of stocks and bonds on the New York Stock Exchange fell off twenty-two per cent. All of these items have a more or less direct bearing on income tax receipts and our increased collections of this year are clearly significant of better business conditions."

While the increase of $9,198,229.71 in collections made from January 1 to April 30 of this year is arrived at by comparison with the collections of the same period in 1922, and actually applied to taxes paid or income received during the calendar year 1922, the Commission declares that final figures for the State's fiscal year ending June 30th will in no way interfere with the increase in collections as reported at this time. In fact, a fiscal year comparison, July 1, 1922 to April 30, 1923, shows an increase in collections of $9,611,

127.35 over the same period ending April 30, 1922.

However, fiscal year comparisons, according to information furnished by the Commission, are not entirely dependable as a means of arriving at the amount of income tax collections or the general economic conditions of any particular calendar year. This is due to the fact that delinquent tax and penalties collected, as well as bank interest accruing in one calendar year may appear in the receipts of a subsequent fiscal year.

The outstanding feature of the figures made public by the Commission today is the welcome news that an increase of nearly ten million dollars in income tax collections is a sure indication of returning prosperity and a complete recovery from the business depression so severely felt in New York State during 1921.

PERSONAL NOTES

The law office of Barry Mohun of Washington, D. C., sends the announcement that Mr. L. T. Michener has been associated with them as counsel.

Announcement has been made of the formation of a new legal firm in New York City to be known as Weill, Wolff & Satterlee. Special attention will be given to federal tax practice. Mr. J. S. Y. Ivins, formerly state income tax director of New York, is associated with the firm.

Mr. George Holmes of New York City is in Europe with a delegation from the United States Chamber of Commerce which is studying European economic conditions.

Professor Fred R. Fairchild of Yale University is engaged in some advisory work for the Columbian government. He will return to the United States in September.

Samuel Lord, formerly president of the National Tax Association, and who has been a member of the Minnesota Tax Commission since its organization in 1907, has been reappointed by Gov. Preus of Minnesota for another six-year term.

THE CASE FOR THE TAXPAYER

The Kansas City Public Service Institute makes the following statement of the tax situation in Kansas City in its bulletin of April 12, 1923:

"The growing percentage of individual and business income which is being demanded by government in the form of taxes constitutes a serious problem. It has been estimated that one-sixth of the total national income is now used for the purposes of government. Everywhere taxpayers are protesting. In many cities the problem is being approached in a constructive way through research and education.

Kansas City

"Since 1915, city taxes per person have been increased 50%.

"In addition, the city government has increased its deficit 600%. The deficit, if paid off in one year, would (in that year) add over 75% to city taxes. Therefore, it must be spread over several years.

"Also, city license and occupation taxes have been increased many fold in the case of numerous lines of business. The new gasoline tax is an additional burden to pass on to the people.

"Further, special assessments for improvements have been enormously increased.

Jackson County, Schools and State

"Since 1915, county taxes per person have been increased 60%. In addition, the county has multiplied its deficit by 170. This deficit, if paid in one year, would (in that year) add about 50% to county taxes. Therefore, it must be spread over several years.

"Since 1915, school taxes per person have been increased over 70%.

"Since 1915, state property taxes per person in Kansas City have increased approximately 35%. In addition, there have been added the state income tax, increased corporation taxes, and other increased taxes.

"The man who paid $100 directly or indirectly to the city, county, schools and state in 1915, now pays $190. Also, every man who now pays $100 of local taxes has staring him in the face $30 of combined city and county deficit.

"No consideration is given herein to federal taxes of any kind, which have increased enormously and add much to the taxpayer's burden.

A Serious Problem

"The Institute does not here maintain that these increases are not justified. Higher prices, salaries and wages account for much. Increased demands on the governments account for some more. The services rendered may all be necessary.

"But the reasons for the increases and the desirability of the services do not alter the fact that *the load is becoming increasingly heavy on the individual taxpayer and on industry.*

"More and more capital is being diverted from industry to government, absorbing more and more of the margin of profit on which industry depends for its growth and expansion.

"To make matters worse, *the end is not yet in sight.* In Kansas City *other increases seem inevitable.* Expenditures are increasing by leaps and bounds. Deficits are piling up higher and higher. New demands for money are pressing. Numerous bond issues are suggested.

What Can Be Done

"What can the taxpayers do about it? There is but one thing—combine for efficiency and economy in government and find out the facts. When taxes absorb so large a proportion of production, it is essential that every device to eliminate waste and secure full value for money expended be adopted. *To insist effectively on economy and efficiency, the taxpayer must have accurate and specific information and be adequately organized to make use of it.* The only hope of keeping taxes down to present levels, or reducing them, is through the informed participation of taxpayers in the affairs of government."

LEGISLATIVE NOTES

MINNESOTA

The Minnesota legislature has passed a law levying a tax of 6 per cent on all royalties received from the mining of iron ore. The new law takes effect immediately and the tax will be collected in 1924 for royalties received in 1923.

ALBERTA

Professor D. A. MacGibbon sends the following summary of recent tax legislation in Alberta:

"The legislature of the province of Alberta at its recent session repealed the Mine Owners' Tax Act and replaced it by a new measure known as the Mine Owners' Tax Act, 1923. The former act levied a tax upon gross revenue deemed to be received by the mine owner upon the basis of the tons of coal removed from his mine premises. The rate was originally computed at five cents per ton but was doubled last year. This led to refusals to pay on the ground that the tax was *ultra vires* as an indirect tax. The new act eliminates the method of computation and provides that the tax shall not be more than two per cent of the gross revenue as determined by the Lieutenant Governor in Council.

"Other new taxation measures enacted are:

"1. *The Mineral Taxation Act.* This act provides that 'every mineral owner, who is a taxable person in respect of any parcel of land in, on or beneath which he is entitled to search for, work, win or get any minerals, shall pay . . . a tax of three cents per acre of the surface of such parcel of land.' Owners paying taxes under the Mine Owners' Tax Act, 1923, or the Corporation Taxation Act are not liable to this tax in respect to any quarter section or river lot being worked or developed.

"2. *The Slot Machines Tax Act, 1923.* This measure levies a tax in the form of a license fee of $50 upon slot machines.

"3. *The Beverage Tax Act,* a tax on soft drinks of three per cent upon the gross revenue received from the sale of such beverages."

NEVADA

The following summary of new sources of revenue in Nevada is taken from the April, 1923, issue of the *Nevada Tax Review:*

"Whenever the burden of taxation upon

tangible property approaches the point where ownership of such property is discouraged, one of two things must happen: either public expenditures must be curtailed, or other sources of public revenue besides property taxes must be found. Generally speaking, it is easier to find other sources of revenue than to curtail expenses; and this has been the history of taxation in other countries, and is rapidly becoming the experience of the various states and municipalities in the United States. It may not be fairly claimed that taxation of property has reached the point of discouraging ownership in Nevada, but certainly it will not be denied that the rate of taxation here is one of the discouraging factors in such ownership; nor can it be denied that a continued increase in taxes such as has taken place during the last twenty years would in a very few years render the ownership of property a luxury and the sale of it most difficult. Despite the fact that house rents are considered very high, and are very high as compared with like rents of ten years ago, it will be found on investigation that it costs more to own a home than to rent it; and one of the chief items of the cost to the owner is the taxes. The same is true of the ordinary ranch owner; with an investment of several thousands of dollars and working hard he finds at the end of the year that the tax on his property absorbs a discouraging share of its entire products. Even in the cattle-raising industry, once so prosperous in Nevada, high taxes too often spell the difference between profit and loss.

"Whatever happens, the tax burden on property in Nevada may not safely be increased. This matter need not be considered with any concern for the taxpayer individually but purely as a commercial proposition; a community where property owning and industrial enterprises are discouraged by a too heavy tax burden would in the long run offer small inducement for an increasing population. The prosperity of this State will not be furthered, but hindered rather, by an increased lavishness of expenditures for public purposes, no matter how worthy the object.

"The recent legislature, unable to withstand the demands for expenditures, sought sources of revenue that might be secured outside of property taxes. As a result several revenue laws were enacted tapping sources of income heretofore untouched. The chief of these in point of revenue expected is the gasoline tax, under which users of automobiles will pay a special tax of two cents per gallon for all gasoline used in propelling vehicles over the public highways. The equity of this tax is based on the fact that modern highway construction is the result of demands for roads suitable for the use of automobiles, and that without this demand the cost of road building throughout the country need not, and would not, have exceeded a small fraction of the cost of the present program. It is an endeavor, and an equitable endeavor, to shift a portion of such cost from the property taxes to the individuals who derive most benefits from the specially constructed roads on the basis of their use of the roads as reflected in the amount of gasoline used. It is estimated that this tax will produce a revenue of $120,000 in 1923, and something more than that in 1924. This is equivalent to a tax of six cents on one hundred dollars of valuation for the entire State, and would, therefore, have allowed a reduction in the State rate to that amount if the tax had been apportioned to the State highway fund; the legislature, however, apportioned the sum of $60,000 from this tax to the State, and the balance to the county road funds on the basis of the number of automobiles registered. This distribution of the fund would make no difference to taxpayers if the counties would consider funds from the gasoline tax in making up the county tax rates; as a rule they are not likely to do so. In Washoe county, for instance, which on the basis of last year's registration will receive something like $18,000 from this source, the tax rate for 1923 had already been fixed, and no change is contemplated because of the additional revenue. In succeeding years, however, the additional revenues from the gasoline tax ought to be reflected in lower county tax rates; and such will be the case if county commissioners refuse to allow these receipts to be dissipated by too liberal expenditures from other funds, as is too often the case with unexpected revenues, in public as well as private affairs.

"Another new revenue law, operated under police powers of the State, is the act 'to control the sale of intoxicating liquors for medicinal purposes.' Under

the federal law (known as the Volstead act), which the legislature adopted as the law of Nevada in a kind of unsight and unseen method of legislation, 'a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician.' The medicine so prescribed may be purchased only from a licensed pharmacist, and such pharmacist must pay to the treasurer of the State the sum of fifty cents for every prescription so filled. Based on experience under similar laws in other states, it is estimated that sufficient medicine will be prescribed and sold under this act to enrich the State treasury to the extent of $30,000 annually. In order to secure the enforcement of this act the office of inspector of pharmacies was created, with a salary not to exceed $3,000 per year and traveling expenses.

"A law was also enacted taxing corporations under a system of fees, which it is estimated will produce approximately $25,000 in State revenues annually.

"An amendment of the laws regulating and licensing insurance business in the State is expected to increase the revenues of the State insurance commissioner's office to the extent of $2,500 to $3,000 per year."

OKLAHOMA

Professor F. Blachly of the University of Oklahoma sends the following summary of legislative activities in that state:

"There has been a growing feeling in Oklahoma that its tax system is out of joint with the times. The session of the legislature which met in January and finished its labor the first of April of this year was quite unwilling, however, to attempt a general revision, but contented itself with discussing a good many bills designed to remedy certain specific difficulties and finally passing some eight or ten tax measures.

"The most important of these was the one establishing a tax code revision commission. This commission, consisting of three members, is charged with the duty of working out a comprehensive survey of the taxation and revenue system of the state and of making its report to the governor on or before the first of September, 1924. Its report is to include the drafts of statutory and constitutional enactments necessary to put a new tax code into effect. The commission is authorized to employ expert assistance, and an appropriation of $10,000 was made for this purpose.

"An excise tax of two cents per gallon on gasoline was proposed, but was amended to make the tax one cent per gallon, and passed in this form. An attempt was made to have the revenue from this tax used by the state highway department for the building of hard-surfaced roads, but local pressure prevailed against this policy and the money is to be distributed to the different counties to be used by the county commissioners on roads and bridges designated by them as 'State Highways'. The distribution, to quote the law, is 'on that percentage which the present approved State Highway mileage within such county bears to the present approved State Highway mileage within the State. . . .' Thus does localism triumph over the establishment of a proper system of road building and maintenance!

"An amendment to the state constitution providing for a state levy, on an *ad valorem* basis, sufficient to raise a fund for the benefit of public schools equal to at least fifteen dollars per annum for each child in average daily attendance in school, was passed by both houses and is to be submitted to the people at the next special or general election.

"To provide adequate revenue to operate schools in school districts in which are tax-exempt Indian lands, a new law was passed. This law provides that when such a district has raised its full levy for school purposes, and has employed all other means for raising revenue, and still finds its revenues inadequate to the needs of its schools, it may, upon complying with certain formalities, receive aid from the gross production tax on lead and zinc derived from within the county containing said district. This aid shall be a sum sufficient, when added to the other revenue of the district, to meet the estimated needs, which must not be in excess of thirty-five dollars per child.

"An attempt was made to reduce the penalty on delinquent taxes from 18% to 10%, but a compromise was finally reached reducing it to 15%.

"Due to a court decision that the one and one-half mill *ad valorem* levy made in 1921 for state purposes by the state board of equalization was illegal as being un-

necessary to meet the requirements of the fiscal year, the legislature ordered the tax collected under this levy returned to the taxpayers, and made an appropriation of $2,150,000 for this purpose.

"Spanish and World War veterans and their widows who are heads of families are added to the list of Union and Confederate veterans as those exempt from taxation of property up to $200 in value.

"Several tax measures of some importance were defeated.

"The most noteworthy of these was an act providing for a uniform system of assessment of property and creating a state tax commission. Undoubtedly it was wise not to enact such a law until after the report of the tax code commission.

"The Governor's measure providing for a tax upon the gross income of corporations was also defeated.

"A bill organizing the county as the unit of education instead of the school district, and providing that this should also constitute the taxing district for school purposes, was defeated on the ground that it would take away the powers of localities over their own affairs. This measure had been recommended by the Bureau of Education of the Department of the Interior in its educational survey of the state, as the chief means of securing equality of educational opportunity and equalizing the tax burden for education.

"An act providing for the levy of a poll tax on every citizen of the state between twenty-one and sixty years of age was defeated, as was an attempt to amend the motor vehicle tax in several important respects.

"Several other minor measures relating to delinquent taxes, special assessments, etc., failed of passage.

"Judging by the discussions which took place on the floor of the legislature, the measures enacted and those defeated, Oklahoma still maintains a decidedly local and provincial attitude toward the subject of taxation."

OHIO

The Ohio legislature has passed over the Governor's veto three of the four measures which constituted the legislative tax program for the current session. These were the Taft bill which provided for higher rate limitations than had been authorized under the Smith "One Percent" law, and the Albaugh bill which abolished the elective assessor and granted a county assessment board composed of the county auditor, the county prosecutor and the president of the board of county commissioners, with a board of employees subject to the control of the state tax commission. The third measure, known as the Robinson bill, provides heavy penalties for failure to list property for taxation. The next step will probably be for a referendum vote to be taken on these measures and it is currently reported that referendum petitions are to be circulated with a view to testing the general sentiment on these measures at the November election.

TAX-EXEMPT SECURITIES VS. PROGRESSIVE INCOME TAX*

PROFESSOR ROBERT MURRAY HAIG

Some time ago Mr. Frank A. Vanderlip asserted that America was a nation of economic illiterates. This undoubtedly shocked many persons, but not the professional economists. They had received their shock long before. However, Mr. Vanderlip's charge is really not so devastating as it appears to be at first glance. Illiterate, after all, may mean merely "having little or no book learning". It does not necessarily imply a lack of intelligence, of ordinary horse-sense or, in John Dewey's language, of an ability to distinguish between what is or is not "bunk". Most economists are prevented from becoming confirmed pessimists because the record shows that, even though we be a nation of economic illiterates, we are not by any means a nation of economic idiots.

Happily, intelligence, not literacy, is the quality required in dealing with the ques-

* Reprinted by permission from the April, 1923, issue of *The North American Review.*

tion of tax-exempt securities. From present indications this question will form the basis for the next amendment to the Federal Constitution. If the pending measure receives the consideration and the disposition it deserves, it means that the public and the state legislators must exhibit an ability to keep to the road through a somewhat complex bit of economic analysis without being diverted into the numerous blind paths which lie along the way. The proposed amendment promises to be a very interesting test of the fundamental economic intelligence of the American people. This paper attempts to disentangle and to discuss the essential issue involved which, in the opinion of the writer, is nothing less than the future of the taxation of income at progressive rates. There are other important factors in the situation, but this is the heart of the problem. If progressive income taxation is to continue as an important part of the fiscal system of the states and the nation, the unlimited issuance of tax-exempt securities must cease.

The economic analysis involved relates to the manner in which the market prices of tax-exempt securities are determined in the presence of an income tax imposed at rates which rise as the size of the taxpayer's income increases. The analysis is one which has long found general acceptance among economists and business men, but its character is such that there is no lack of opportunities to wander astray.

Whether or not one approves progressive taxation, that principle has been definitely established in the fiscal systems of all modern democracies. Whether or not one believes that the Congress of the United States and the legislatures of some of the states have been wise in pushing the rates to the present high levels, the fact remains that these scales have been written into the statutes as representing the sentiment of the community. They actually exist and they were constructed with the intention that they should be paid. In large measure they are not being paid, because of tax-exempt securities. Unless the issuance of such bonds is brought under control, the progressive feature of the income tax will become in its practical operation so ineffective and so unjust that its entire abandonment will be a logical necessity.

One can conceive of conditions under which it would be only common sense to make all public bonds tax-exempt. If the governmental organization of the country were completely unified and if the aggregate public borrowings were sufficiently limited in amount, tax-exempt bonds could be used with the assurance that the Government would receive back in lower interest rates and increased market standing of the bonds the full worth of the exemption from taxation which it granted. Under such conditions there would indeed be a positive factor in the situation which would throw the balance definitely in favor of the exemption policy, for after all it requires some effort to transfer money from one pocket into another. However, these two essential conditions do not now exist and cannot ever be expected in this country. Instead there exists a congeries of overlapping governmental authorities which issue securities exempt from the taxes not only of their own but of the other jurisdictions as well. This effectually prevents any one political division from reaping the benefit of its own (and only its own) exemptions from taxation. Again, the aggregate public borrowings, instead of being very limited in amount, are enormous and there is no reason for believing that they will grow smaller. As a consequence the government does not and cannot receive back the full worth of the exemptions it grants.

These statements require elaboration. First, consider the manner in which the size of the total public borrowings affects the problem. When the Federal Government sells a three and one-half per cent bond containing an agreement that the interest shall be exempt from its progressive income tax, it offers a concession which is of different value to different individuals. The privilege of being excused from paying income tax on the interest is a great or a small privilege depending upon whether the rate of tax which would otherwise be payable is high or low.

How wisely the value of this privilege may vary can be grasped from this simple example. If the $35 interest on the three and one-half per cent bond happens to be received by a millionaire with an income of over $200,000, the amount of tax which he would be excused from paying under the federal rates now in force would be $20.30. That is the portion of the $35

which he would be asked to pay in income taxes if the interest came from some non-exempt source such as an ordinary industrial bond. Obviously, this millionaire would be willing to pay more for a government bond carrying this tax exemption than for an ordinary industrial bond, even assuming such bonds to be identical with the government bond in all other respects. The tax-exempt bond is really worth to him an additional sum equal to the present value of the annual item of $20.30 which he is excused from paying for the term of the bond.

Such a bond is worth something less to a second rich man whose income is $150,000 instead of $200,000. The tax he is excused from paying is $19.95 instead of $20.30. The value of the exemption steadily declines as the taxable income of the owner of the bond is assumed to diminish, until the tax-exempt privilege becomes valueless to the owner whose income is so small that he is subject to no tax at all.

So long as tax-exempt bonds are restricted to an amount which can be readily absorbed by the heaviest taxpayers—those in the highest surtax group — the government can expect to receive a full return for the exemption granted, for the market value of the bonds (or, what amounts to the same thing, the rate of interest) will be established by the demand of those to whom the exemption is most precious. Just so soon, however, as the number of such bonds exceeds the demands of this group of very rich men and it becomes necessary to dispose of them to taxpayers in the next lower class, the market value of the bond begins to drop. For such a bond cannot be sold to a $150,000 man who saves only $19.95 by purchasing it, at as high a price as can profitably be paid by a $200,000 man who saves $20.30. The lower market-standing of the bond, now fixed on the basis of its value to the $150,000 man, is a value which extends to the entire issue, so that the $200,000 man may now buy his bond at a price lower than its full worth to him. In other words, through this process by which the market value of the bond declines, the $200,000 man reduces his true, effective tax rate to the level of the $150,000 man. The law says that he shall pay a 58 per cent income tax on his income in excess of $200,000. By buying a tax-exempt bond at a price fixed by the value of the exemption to the man in the $150,000 class, he reduces that 58 per cent to 57 per cent. The tax-exempt bond is then a device which has the peculiar quality ascribed to the Scotch hen of the old nursery rhyme:

> Bobby Shaftoe has a hen,—
> Cockle button, cockly ben,—
> She lays eggs for gentlemen,
> But none for Bobby Shaftoe!

If Congress was really in earnest when it said that equality of tax burdens demanded 58 per cent of every dollar of income received by an individual above $200,000, then, in authorizing the issuance of tax-exempt bonds in such numbers that their market price is determined by relatively small taxpayers, it has destroyed that equality. Consciously or unconsciously, by its own act it has created a device whereby that dollar is actually burdened less than the 58 per cent which justice and equality presumably demand.

Keeping in mind the character of this process, which is known among economists as capitalization, attention may be given to the quantities of the tax-exempt bonds which are available in the market and to the ability of the taxpayers to absorb them. Have they or have they not been issued in excess of the demands of those to whom the tax exemption is most valuable?

Estimates of the amount of tax-exempt securities outstanding vary from ten to thirty billions, a range truly amazing until one comes to examine the bases upon which the estimates are made. The highest estimates include all of the federal bonds—even those which on their face are not entirely exempt from the income tax—on the assumption that such bonds are not held to any great extent by individuals in excess of the amounts covered by the blanket exemptions allowed each individual, which at present altogether amount to $165,000, par value, of the various issues. Since after July 2, 1923, this figure drops to $60,000 and three years later to $10,000, the important qualification which must soon be made in the largest estimates is a point to be taken into account. The total interest-bearing debt of the Federal Government on January 31, 1923, amounted to $22,354,059,703.55.

But in addition to the exempt portion of the federal debt, the entire issues of all

of the states and their political subdivisions must be taken into account. These securities, according to the preliminary figures of the Educational Finance Inquiry Commission, amounted to $6,524,040,734 in 1920. The issues since that date raise the figures to approximately ten billions.

After all, these sums mean little until brought into relationship with the power of those in the highest surtax groups to absorb tax-exempt securities. Inquiry was made among dealers in securities in February, 1923, regarding the classes who were finding it profitable to invest in such bonds under the market conditions existing at that time. The answer cannot, of course, be given in precise form because of the variable importance ascribed by different investors to the element of safety, but the testimony showed that many conservative investors, with annual incomes as low as $20,000, were finding it advantageous to invest in tax-exempt bonds at the prices of such securities then current. Less cautious investors who normally placed their funds in sound preferred stocks found tax-exempt bonds attractive when their income approached the $50,000 mark.

The significance of this situation becomes clear when it is realized that the income tax rate is only 16 per cent at the $20,000 mark and only 31 per cent at the $50,000 mark. This means that the flood of tax-exempt securities has been great enough to satisfy completely the demands of all the large surtax-payers and that the market price of such bonds has dropped to a point where they attract investors with incomes of relatively moderate size. In other words, the very rich may now purchase these bonds at prices based on the value of the tax-exemption to a $50,000 man, or even to a $20,000 man, rather than its value to the recipient of a $200,000 income. It indicates that so far as investment income is concerned, the surtax schedule above the 31 per cent rate is virtually inoperative. To this extent the progressive scale has been flattened out. While the income tax law pretends to levy rates on such income ranging up to 58 per cent, tax-exempt securities in effect cut that maximum rate practically in half. Under these conditions the $200,000 man can buy himself free of the tax of $20.30 on the three and one-half per cent bond at a price fixed by the demand of a man who is freeing himself of a tax of only $10.85. Clearly, under these conditions, the Government loses in taxes more than it gains in reduced interest rates or increased market-standing of its bonds.

In passing, attention should be called to the type of income whose burden is thus virtually cut in two. It is not income from salaries, fees, or business. It is investment income, "lazy" income, as Gladstone was fond of calling it. In England income tax rates are arranged so as to favor "industrious" income as compared with investment income. There is a strong sentiment in this country in support of a similar policy. The effect of tax-exempt securities is in exactly the opposite direction. The man who earns $200,000 pays 58 per cent. The man who inherits a fortune and places it in tax-exempt bonds yielding $200,000, pays the equivalent of a tax of about 31 per cent.

The conclusion must be that the quantities of tax-exempt securities are so great that it is impossible for the Government to reap the full value of the exemptions it grants. There is still another element involved. Because of the form of the governmental structure of this country, these interest exemptions on government securities permit one governmental body to profit at the expense of another and at the expense of the interests of the community as a whole. Even if the United States Government were the only authority which issued bonds and imposed progressive income taxes, the legal evasion described above would develop. Heavy taxpayers would buy themselves free of the tax without paying an equivalent amount in the form of an advanced price of the security. But not only can the United States itself issue bonds which are exempt from its own tax, but, due to the constitutional situation, every State and every little subdivision of a State, down to the most insignificant school or drainage district, may issue its securities exempt from federal income taxes. This means that a county in Oklahoma may, in effect, pay a substantial part of the cost of new roads with federal income taxes, for the millionaire investor can buy himself free of the federal tax by investing in a bond of the Oklahoma county. He will pay something more for the bond, it is true, than he would pay if it were not tax-exempt. However, as shown above,

he will not pay a sum at all commensurate with the value of the federal exemption. Moreover, what he does pay will go, not to the federal treasury, but to the Oklahoma county. Here is federal aid gone mad. If there were no better solution it would pay the Federal Government, as a price for abolishing the exemptions, to give to the localities a sum equal to the advantage they gain from the exemption of their bonds from the federal income tax. Since the amount of the tax-exempt bonds which may be issued by the States and their political subdivisions is entirely beyond the power of the Federal Government to control, it is clear that the principle of a federal progressive income tax lies quite at the mercy of these jurisdictions.

The exemption from the comprehensive federal income tax at present available to State and local securities is, therefore, to all intents and purposes a direct bonus to the localities. This has been recognized by economists for many years. Professor Edwin R. A. Seligman, for example, in his standard work on *The Income Tax* (2d ed. 1914, p. 614) says:

"The constitutional inhibition, if it means anything, means only that the National Government shall not discriminate against the States by injuring their power to borrow. It does not mean that the National Government should discriminate in favor of the States by enhancing their power to borrow. A special exemption of State bonds from a general income tax would, if it increased the market price of these securities, be tantamount to a gift from the National Government to the State Government. Such a relation, however, is not contemplated by the Constitution. It is not the function or the province of the National Government to confer gifts or favors upon the State governments. The States can look after themselves, and all they have a right to ask from the National Government is that there shall be no unconstitutional interference with their powers. Equality under the Constitution they have a right to claim; special favors they have no right to demand."

It should not be forgotten that progressive income taxation is a principle of vital importance to the states themselves. A number of states already have progressive income taxes in operation and such taxes form an essential part of the most promising plans of state tax reform. The student of taxation is indeed bold who contends that federal income tax rates will always remain high and State income tax rates low.

Most of the available space of this article has been exhausted in the attempt to make clear the importance of this problem of tax-exempt securities in its relation to the principle of progressive income taxation. This was done because it is felt that this aspect is of overwhelming importance as compared with the rest. The exemptions have many other ill effects, aside from their devastating influence on progressive income tax scales, a few of which may be briefly stated.

The advantage to be gained through investments in tax-exempt securities has greatly disturbed the normal investment habits of the very rich. Large sums which formerly found their way into mortgages and public utility bonds have been diverted from their normal course and into the public treasuries by the artificial interference of the exemption privilege. The result has been complaints from farmers and home-owners regarding the scarcity of mortgage money and complaints from the public utilities not only about the scarcity of capital, but also regarding the competition to which they are often subjected by government-owned utilities financed with the proceeds of tax-exempt bonds.

The manner in which the interests of the farmers are affected by the exemptions is not always clearly grasped. If Senator Fletcher fully appreciated the true price paid for the lower interest rate borne by the Federal Farm Loan bonds because of their exempt character, could he defend his assertion that "this whole cry against tax-free securities found its very beginning and inception in the Land Mortgage Bankers' Association—a multi-millionaire organization which has grown rich out of the charges it has imposed upon the farmers of the West" (*Congressional Record*, January 26, 1923, p. 2490)? As a matter of fact the net amount of Federal Farm Loan bonds outstanding on January 1, 1922, amounted to only $284,000,000, scant three per cent of the lowest estimates of the total amount of the tax-exempt securities. Moreover, the evidence before the House committee is to the effect that only five per

cent of the farm loans are made through the Federal Farm Loan system (67th Cong., 2d Sess., H. R., Rept. 969, p. 21), and the other ninety-five per cent through channels drawing upon a loan fund depleted by the competition of tax-exempt securities. Are "the farmers of the West" so in love with the taxpayers receiving incomes of over $50,000 that they propose to exchange the only means of securing an effective progressive income tax for such a mess of pottage?

In these exemptions many students find a partial explanation of the recent enormous increase in state and local borrowings, which have nearly trebled since 1910. Whether the charges of extravagance be well founded or not, is it well to continue at federal expense the present obvious incentive to large state and local expenditures? If the progressive income tax at high rates is an essential part of the federal tax system, is not the argument valid that tax-exempt securities constitute a danger to the stability of the federal financial system itself?

There are those who consider progressive income taxation unimportant. That there is a considerable number of such persons is shown by the strength of the movement favoring a general tax on sales. There are some who consider progressive taxation positively unsound and obnoxious. These are chiefly those who are asked to pay the higher surtax rates. Much of the opposition comes from these two classes and much of the argument is disingenuous. They are against the amendment primarily because they fully realized that the continuance of the present system means the speedy ruin of progressive income taxation in its present form in this country. This they very much desire, but it is not an effective argument in view of the known sentiment of the country. Consequently much dust is being tossed into the air and the real issue is being obscured. Let there be no doubt about it: The country must decide, and that very quickly, whether it wants tax-exempt bonds or highly progressive income taxes. It cannot have both.

REPORT OF THE LEGISLATIVE TAX COMMITTEE OF IOWA

II. BUDGET REFORM

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The rapid increase of public expenditures in recent years is the primary cause of the current popular interest in budgets and budget reform. To some extent this interest is intelligent and is being wisely directed along constructive lines. On the other hand, very much, perhaps the major part, of current budget literature is of a superficial character, largely for propaganda purposes, and not based upon a thorough historical and comparative study of the problem.

This situation is both unfortunate and necessary—unfortunate, because many honest people are misled into believing that even the word budget, or, at any rate, a coordinated list of estimates of revenues and expenditures, is a magical wand whereby sound business principles may at once become the rule in state affairs—necessary, because every important movement must pass through a period of high-sounding phrases. As a matter of fact, there is nothing unusual or mysterious about budget procedure. In most cases, large private business operates on this basis, and has done so for some time. To do otherwise would be to disregard the plain and obvious principles of sound business practice. Speaking in the concrete, and from a broad comprehensive point of view, a budget is the one practicable method of reducing public affairs to a business basis.

Bearing in mind these general facts, it may be said that budget procedure consists of the following steps: first, submission of estimates by department heads to some central authority; second, coordination and revision of these estimates by a central

official or board; third, the budget as a project of law; fourth, the execution of the budget as a problem of administration; and fifth, the complete and accurate accounting of public revenues and public expenditures. A much more detailed classification is possible and of distinct practical value from certain points of view; but for this brief statement, the five principle stages in budget-making will answer our purpose.

The first step is fairly well understood, and represents a long-standing practice. Department heads receive from their subordinates a statement of revenues and expenditures for the last fiscal year, possibly for two fiscal years; an estimate of expenditures for the current fiscal year, and of the succeeding biennial period. These estimates are coordinated, revised, and passed on to the central official or board having in charge the preparation of the executive budget for presentation to the law-making body. Up to this point, estimates are of public expenditure only and not of public revenue.

The second step, or executive budget, includes both revenues and expenditures, usually covering a five-year period, and should be a document very carefully prepared, both from the standpoint of the resources and needs of the state. In parliamentary government, the task of preparing such a budget is usually vested in an official known as a finance minister. In the United States, the power and authority of preparing this particular budget is vested in the President. Prior to recent budget legislation, the Secretary of the Treasury prepared the executive budget under the general supervision of the President. In about one-half of the American states, authority of a somewhat similar character is vested in the Governor. In other states, and in a great many minor political subdivisions, the preparation of an executive budget for submission to the law-making body is vested in a board.

It may well be doubted whether the political experience of the United States, the various state governments, and minor political subdivisions, has yet arrived at a very practical solution of the second step in budget-making. In parliamentary governments, the finance minister, who prepares the executive budget, has the distinct advantage of serving also in the capacity of a legislative official responsible for the enactment of the budget as a project of law. We have nothing in our political experience quite corresponding to this very practical union of executive and legislative authority in one person, hence the much more difficult task of scientific budget procedure under our congressional committee system of government with its well-known theory of the separation of powers.

The third stage, or the legislative budget, is the very heart of the problem. The levy of taxes and the authorization of public expenditures are legislative functions and must remain so in a democracy. Even the best executive budget is of no avail if the law-making body consigns the same to the waste-paper basket and builds its own budget in the old way. Unfortunately this is the rule rather than the exception with the majority of our law-making bodies. Failure to appreciate the simple fact that legislative action is essential before any budget is an accomplished fact has frequently led to what the writer believes is a hasty conclusion that an executive budget prepared by the governor of a state, the most common system now in force, is necessarily preferable to a budget prepared by a board headed by the governor, but including leading members of the legislature having in their charge financial matters. It is freely granted that the second stage of budget-making, as outlined above, can be more efficiently executed by one able and fearless leader; but a more nearly perfect budget at this stage may degenerate into the well-known "pork barrel" in the hands of a hostile general assembly. All is well that ends well, not that necessarily begins well, in budget-making.

In parliamentary governments like that of Great Britain, the executive head is likewise the legislative head, who must command a majority for the budget. In contrast to this union of powers in one head, we have a separation of powers among many heads or committees, each member of which is jealous of his prerogatives. In the typical American state, even the executive power is vested in a council of several members and not in one man. As to the average state legislature, everyone is responsible, which means that no one is responsible for the making of a

budget. As a matter of practical politics, it may well be doubted whether the average governor of an American state exercises as much influence from a budget point of view as any one of a half-dozen leading members of the legislature of the same state. This is no necessary reflection on individual officials as such. Fundamental systems of political organization and not the character of men are primarily responsible for this situation, which, to say the least, is unfortunate from the point of view of sound budget practice. Now and then a very outstanding governor rises to the dignity of real leadership along budget and other lines, which is the exception that proves the rule.

Any program of budget reform that fails or refuses to look these facts squarely in the face, may result in a substantial improvement over present systems; but, at best, it can mean little more than the pouring of new wine into old wine-skins. The Legislative Tax Committee of Iowa, in recommending a state budget board composed of the governor as Chairman, the Auditor of State, the three members of the State Board of Assessment and Review, and the four chairmen of the committees on appropriations and ways and means of the General Assembly, had in mind the budget from an executive, legislative, administrative, and accounting point of view, and not merely the typical executive budget of estimates. It is hoped that a budget submitted by this board may have real weight with our General Assembly. If this hope is realized, a small beginning will be made in bridging the gap between the second, or executive, and the third, or legislative stage of budget procedure.

The committee, however, recognizing that this beginning is not practicable except through a radical change in the legislative rules of procedure, which is made clear in the following recommendation:

"Your committee suggests that the legislature authorize a joint budget committee, composed of the four legislative committees on appropriations, and ways and means, said joint committee to be charged with the responsibility of coordinating into the budget bill all matters which relate to public revenues and public expenditures. Such rules would not prevent a member from introducing an appropriation or a revenue bill, but such measure should be referred to the usual committee, and if reported favorably, should be rereferred to the budget committee for consideration, and coordination with the general budget plan."

The fourth logical step is the execution of the budget as a problem of administration, both general and technical. Once money is voted for a certain purpose, it should be expended wisely in order that a dollar of taxes may purchase a dollar's worth of material or service for the state. In the case of roads and bridges, this means proper plans and specifications, and an efficient engineering supervision of the work. Expenditure for educational work should first have the general supervision of a governing board with real business capacity; and second, an able corps of teachers under the best technical supervision.

From this point of view the state budget system proposed by the Legislative Tax Committee may be subject to criticism by those who are not familiar with the work already accomplished in this special field as the result of earlier legislation. The major part of our state expenditure is now under the supervision of the Board of Control, the State Board of Education, and the Iowa Highway Commission—boards which have set a high standard of efficiency from the point of view of the budget as a general and technical administrative problem. The thought of the Legislative Tax Committee was to supplement, not usurp the functions of these boards already so well performed. With the proper consolidation of departments, two additional state boards could execute the balance of the state budget as a problem of administration. It is of course possible to place miscellaneous departments under the immediate and direct supervision of the proposed State Budget Board. Legislation of this kind, however, always meets with serious political opposition, and can be enacted at a later date after a good beginning has been made in the work of real state budget reform.

The final stage of the budget is the proper accounting of all public revenue and public expenditure. The tendency has been to do this work in a rather superficial manner and on the installment plan. Until recently there were several accounting departments at Washington, D. C. The budget law has wisely coordinated

these under one central authority. In Iowa a good beginning has been made in the office of Auditor of State, which, for that reason, was given membership on the proposed State Budget Board. Both the state and local budget bills proposed by the Legislative Tax Committee, if enacted into law, will greatly strengthen and simplify the accounting phases of budget procedure. A solid, substantial foundation will be laid on which to build the completed structure by the slow and safe processes of evolution.

Bearing in mind the above general considerations, the Legislative Tax Committee prepared and submitted a local budget bill and a state budget bill as a part of their report to the General Assembly. Aside from the suggestion that legislative rules of procedure should be so amended as to make possible a joint budget committee as noted above, the essential provisions of the budget bills are summarized by the Committee in the following language:

"Your committee recommends for your consideration a state budget bill which provides for a state budget board of nine (9) members, composed of the Governor, Auditor of State, the chairmen of the Committees on Appropriations and Ways and Means of the General Assembly, and the State Board of Assessment and Review. We believe that this plan is justified by the experience of other states. The Governor is the executive head of the commonwealth, and in many states is made directly responsible for compiling and presenting the budget to the legislature. The Auditor of State, under the laws of Iowa, is the accounting officer, and necessary statistical data are printed in his reports. The State Board of Assessment and Review provided for in a companion bill, is given general supervision of all matters relating to assessment and taxation, including all powers of this character now vested in the executive council, and therefore will possess technical knowledge of the state revenues. The chairmen of the Committees on Ways and Means and Appropriations of the House and Senate are selected by the General Assembly to assume leadership in the very responsible task of enacting the budget into law.

Section three (3) provides for a state budget report and a state budget bill, the latter to be presented to the General Assembly by the Governor, when he reads his message. Section four (4) prescribes in detail the financial reports required to be submitted by each and every department of the state government. Reports of this character, it should be especially noted, must include citation to any statutes providing for so-called continuing appropriations, in order that the General Assembly may know at a glance the exact amount of state income to be used by a department which is already receiving continuing appropriations and is asking for an increase. Section five (5) requires a financial summary, and section six (6) prescribes a detailed plan of making the budget report.

The remaining sections deal with the printing of the budget report and the budget bill, the hearings granted departments of the state government asking for an increase of appropriations, how written statements filed with the state budget board shall be prepared, the employment of assistants, uniform accounting practice, approved statistical methods, and the necessary appropriation.

If this bill is enacted into law, for the first time in its history the state of Iowa will have a budget report setting forth in detail the income and expenditure of the state for the biennium preceding, and an estimate of the income and expenditure for the succeeding biennial period. This estimate is based upon a careful analysis of public revenue on the one hand, and the real needs of each and every department of the state government on the other. Under this system all the appropriations requested by each and every department of the state government will be presented in one budget bill.

* * * * * *

A complete budget policy is an executive, administrative, and legislative process. It may be observed that the present national budget system is only executive and administrative in character, and will remain so, unless Congress, in its wisdom, shall adopt modern rules of budget procedure to take the place of the present committee system, and efforts are now being made in that direction.

One other important fact should be observed regarding the work of the state budget board. The duties of this board will in no way conflict with the work of the present state boards and commissions. Its functions are of an entirely different character, being confined primarily to the executive aspect of budget-making. The General Assembly will surrender none of its control over the budget, but will be supplied with such information as will permit the exercise of that control more intelligently than has been possible in the past. The State Board of Control, State Board of Education, State Highway Commission, and similar bodies would continue to prepare their respective budgets for consideration of the state budget board, thereby assisting that board in preparing a budget report.

Your committee is also presenting a local budget bill, and the same general principles apply here as in the case of state or national budgets. The proverbial inefficiency of local government in administration creates a very practical need for a local budget system. This inefficiency in some cases is so marked that limited state supervision of local budgets is necessary to protect communities from extravagance and ill-advised expenditures. In some states, constitutional limitations do not permit such legislation, but the General Assembly of the State of Iowa has the authority to create forms of local government in harmony with sound budget principles. Some progress has been made along this line in local city and county administration. The city manager plan, the council manager plan, and uniform systems of accounts may be mentioned as examples.

The local budget bill makes it unlawful for any municipal corporation in this state to levy

any tax on property until a careful estimate has been made of the total amount of money purposed to be expended. All estimates of this character must be given publicity a sufficient length of time in advance of the date of authorizing tax levies or special assessments to permit discussion at public hearings. All data of this character are required to be submitted in a manner and form prescribed by the state board of assessment and review.

The local budget committee, charged with the responsibility of preparing budget estimates is to be composed of the levying board of a given municipal corporation together with an equal number of qualified electors and freeholders appointed by said levying board. No tax shall be levied in excess of the estimates published, and five per cent (5%) additional, except by direct vote of the people, and after approval by the state board of assessment and review. After a proposed budget has been determined by local authorities, including bond issues, special assessments and taxes, the proposal is subject to the right of appeal to the state board of assessment and review in the manner prescribed by law. This right of appeal is the heart of the proposed budget law. In preparing the proposed bill, we have been largely influenced by the experience of Indiana, where a similar system has been in operation and has saved millions of dollars of the taxpayer's money.

As a general rule, local officials are honest and well-intentioned; but they are often subject to great pressure from those financially interested in proposed public improvements. The purpose of state supervision is to provide salutary restraint through publicity and the right of appeal. It will be observed that the state board of assessment and review has no authority to increase taxes or special assessments; but can only approve or reduce such taxes or special assessments as may have been levied by the local authorities.

In providing for the state supervision of local budgets, the bill requires that only one copy of each local budget, including a summary thereof, and one copy of the tax rates necessary to produce the amount of money required, shall be certified to the state board of assessment and review. In the case of bonds of municipal corporations, state supervision does not extend to temporary obligations for which levies have been authorized as provided by law, nor does it extend to such issues of bonds as may have been authorized by a vote of the people."

The General Assembly adjourned on April 17th without taking any action on the bills providing for a county assessor, a state board of assessment and review, state and local budget boards. Sentiment in favor of tax and budget reform crystallized gradually during the session; but certain influential supporters of the bills reached the conclusion that it would be wise to postpone taking a vote on measures of such importance until the General Assembly meets in Special Session on December 4th to revise the Code of Iowa.

DECISIONS AND RULINGS

EDITED BY A. E. HOLCOMB

INCOME, STATE—SOUTH CAROLINA ACT HELD VALID. — The provisions of the federal income tax law, except as to the rate of the tax and the regulations pertaining thereto, were adopted as part of the South Carolina income tax law. The tax was attacked on a number of grounds, but the court upheld the tax. It held that in the absence of a constitutional inhibition, there was no reason why a valid federal statute might not be made part of the law of the state by adequate reference thereto; that in adopting such federal statute there was no delegation of legislative powers to federal officers since it must be presumed that the legislature adopted only the existing federal act and regulations, and not any future federal act or regulations; that there was no delegation of legislative powers to the state tax commission since a state might vest its administrative offices with a large measure of discretionary power relative to the making of rules and regulations for the enforcement of the law, not inconsistent with its provisions; and that the statute could not be held invalid as violating the interstate commerce, due process and equal protection clauses of the federal constitution.

The court observed that while the statute showed a lack of careful workmanship and cohesive construction, it was nevertheless capable of a reasonable construction, indicating the following conclusions; that a tax was imposed on all persons and corporations within the state liable to the federal income tax, at one-third the federal rate; that the existing federal act and the rules and regulations pertaining thereto were adopted; that the state tax commission was vested with duties and powers for the enforcement of the act similar to those of the commissioner of internal revenue under the federal act; and that the

liability of non-residents and foreign corporations within the state was to be measured by the separate net income accruing from business done or arising from other sources within the state, to be returned in the form and manner required of non-residents and foreign corporations under the federal act. — *Santee Mills* v. *Query,* 115 S. E. 202.

INHERITANCE, STATE — MONTANA ACT. —The Montana statutes impose a tax upon inheritances of direct heirs not exceeding $25,000 but fail to provide for a rate of taxation for such inheritances in excess of that amount. The state sought to collect a tax on that part of the inheritance of a widow which exceeded $25,000, at the statutory rates applying to the inheritances of less than $25,000. The court held it to be clear from the language of the statute, that the legislature failed to provide for a tax on inheritances in excess of $25,000, hence the widow's inheritance was subject to taxation only to the extent of $25,000 less the statutory exemption. — *State* v. *Walker,* 210 Pac. 90.

MOTOR VEHICLES — INVALID CLASSIFICATION. — The Texas statutes require all commercial motor vehicles to be registered but prohibit the licensing of vehicles having a carrying capacity in excess of a certain weight. Vehicles used for agricultural purposes are exempt from the statutory provisions, and may be used on the roads regardless of their carrying capacity. The court held the statutes invalid on the ground that the classification of motor vehicles was arbitrary and capricious.— *Lossing* v. *Hughes,* 244 S. W. 556.

INHERITANCE, STATE — SUSPENSION OF TAX PROCEEDINGS.—A New York decedent at his death owned securities which were pledged as collateral to secure a loan made by others, which loan did not become due until some time after decedent's death, and it was uncertain at such time whether or not the securities would have to be resorted to. He also had an interest in a partnership, under the terms of which it was provided that the surviving partner should have the sole custody of the assets for three years after the death, with the right to liquidate the same. The court was asked to determine whether the appraisal of the estate should be suspended until the liquidation of the partnership assets and the maturity of the loans. It held that it was not aware of any statutory provision requiring the immediate appraisal of an estate after decedent's death, and that whether in a given case the appraisal should be postponed or made at once was a question to be decided by the courts, in their discretion, and that this case with respect to both the partnership interest and pledged securities was such that the court might well think it wise to delay the appraisal for a reasonable period. It observed, however, that the appraisal was to be made as of the date of the death, and was not to be affected by any increase or decrease in the value of the property subsequent to the death.—*In re Hubbard's Estate*, 137 N. E. 17. See *Bul.* VII, 258.

INHERITANCE, STATE—INVALID DEVISE —WAIVER.—The New York statutes prohibit the devise by a testator of more than one-half of his net estate, where a wife, child or parent is living. A decedent made such a devise, although he had a daughter living. The state sought to impose a tax on the daughter for the portion of such devise which exceeded one-half of the net estate, although she had waived her rights thereto. The court held the tax invalid, on the ground that the daughter was the only one who could attack the devise.— *In re DeLamar's Estate,* 197 N. Y. Supp. 301. See *Bul.* VII, 296.

INHERITANCE, STATE—NEPHEW OF DECEASED SISTER TAXABLE AS TAKING IN OWN RIGHT. — Under the Georgia act, transfers to brothers and sisters of the deceased were entitled to exemption of $5000 and were taxable at 1%; transfers to all others were taxable at 5%, without exemption.

The son of a sister, who predeceased the decedent, claimed that the general law of descent was applicable in interpreting the transfer tax statute and that under such law he took not in his own right but by virtue of his mother's right, and hence should be taxable as she would have been, if living. This contention was denied and the transfer was held taxable at five per cent, without exemption.—*Nace* v. *Cooper,* 115 S. E. 262.

SPECIAL ASSESSMENTS — DISCRIMINATION. — A special drainage district was

established in Arkansas and the act creating it authorized an annual assessment of six per cent upon the assessed valuation of all lands in the county and of railroad tracks therein. The district officers levied a tax in 1918 of $7,346.12, of which $4,194.60 was levied upon the railroads and $3,151.52 upon the 12,000 acres of land in the district. The railroads obtained an injunction in the federal district court restraining the collection of the tax, which was affirmed by the circuit court of appeals as so discriminatory as to amount to a denial of the equal protection of the laws (277 Fed. 708).

Upon appeal to the Supreme Court, the question was whether the facts admitted and found established, that the tax upon the railroads violated rights guaranteed by the Fourteenth Amendment. The district was wholly rural, only one-tenth being under cultivation. The total assessed value of the lands was $52,525.33 and the improvement would increase their value by at least $250,000. The railroad had 3.61 miles of single track with an assessed value of $69,910. Its tracks were laid on a fill and hence it could receive no direct benefit from the embankment designed to drain and protect the district from overflow.

The court observed that the tax would impose a very heavy burden, from which the railroad would receive no direct or immediate benefit, while the lands which would receive a large direct benefit were required to bear only a small part of the burden. While the railroad would doubtless derive an indirect benefit through increased traffic, this benefit could only accrue after the lands were reclaimed which had not even begun. It was argued that as time went on the lands would bear an increasing share of the burden, while the railroad would bear less of the burden, so that the adjustment would work out equitably in the long run. The court held this argument to rest wholly upon prophecy; that the fact was that the tax was grossly discriminatory, of which the best to be said was that the burdens upon the railroad would grow less as its ability to bear them grew greater. The decree was affirmed. — *Thomas et al.* v. *K. City So. Ry. et al.,* U. S. Sup. Ct., Apr. 9, 1923. See *Bul.* VII, 300.

Excise, Federal — Sales for Export Exempt.—A foreign purchaser ordered a domestic commission merchant to purchase for its account certain sporting goods and to ship same as per specific directions. The commission agent ordered the goods from a domestic manufacturer who delivered the goods to a steamship company and delivered the receipt to the commission agent, who paid for the goods. A tax was collected from the manufacturer under the Revenue Act of 1917, under duress, and suit was brought to recover the same.

The district court sustained a demurrer by the collector, on the ground that the domestic sale to the commission agent was a separate transaction and not a step in a sale for export, and hence not exempt from tax under Article I, section 9 of the Constitution forbidding a tax on exports.

The Supreme Court reversed the judgment, holding that the transaction must be viewed as a step in exporting, regardless of the fact that title passed when the goods were delivered to the carrier; that in such cases some point of time must be fixed at which exporting begins and that a given case must be decided with reference to which side of the line it falls. Here the delivery to the carrier, with passing of title, was an act committing the goods for transportation across the sea and the intended and accomplished effect of that act was to start them for a foreign port. That further acts were necessary before the goods could actually get to sea did not matter, so long as such acts were the regular steps towards the contemplated result. Getting the bill-of-lading was no different in effect than putting the goods on board ship. Nor did it matter that the commission merchant might have changed his mind and retained the goods for his own use, as there was not the slightest possibility of this and it did not occur. Theoretical possibilities were not to be considered. The overt act of delivering the goods to the carrier marked the distinction between this case and that of *Cornell* v. *Coyne,* 192 U. S. 418, and to put the time for testing the transaction as one in export trade, later than the delivery to the carrier would be to fail to give to exports the liberal protection that they have hitherto received, as illustrated in *T. & M. M. Ins. Co.* v. *U. S.,* 237 U. S. 19. — *A. G. Spalding & Bros.* v. *Edwards,* U. S. Sup. Ct., Apr. 23, 1923. See *Bul.* VIII, 116.

Federal Transportation Tax—Pipe Lines. — The federal circuit court of appeals affirmed the district court's decision in a case involving the application of the tax on the transportation of oil by pipe lines, where the corporation taxed was wholly owned by a refining company and was engaged solely in transporting oil owned by that company. The pipe line company's accounts were kept by the refining company and the charges for transportation were recorded by book entries and the expenses of the transportation were met by transfers of cash from the refining company to the bank account of the transportation company. The officers of both companies were the same persons. Refund of the taxes collected was sought on the ground that in effect the transactions were those of a single company dealing with its own property in its own way, and hence the tax did not apply as for amounts paid for transportation.

The court discussed at length leading decisions of the United States Supreme Court and held that these decisions clearly established the doctrine that the ownership of stock did not effect a control of operation; that the company whose stock was thus owned nevertheless constituted a distinct operating entity and that the owning company did not have such control as to render it subject to obligations imposed upon the owned company. The income tax cases of *So. Pac. Co.* v. *Lowe* (247 U. S. 330) and *Gulf Oil Corp.* v. *Lewellyn* (248 U. S. 71) were discussed and distinguished as supporting rather than destroying this doctrine.

The claim was made that in this case the pipe line company was not a public utility, as it was merely transporting the product of a single owner and was not serving the public generally. This contention was held untenable, in view of the statutes of California in force when both the corporations in question were organized, and which defined a pipe line as a public utility. Furthermore, the court pointed out that even if this were not so, the act imposed the tax upon the transportation of commodities owned by the carrier, except such as were necessary in the conduct of the business of the carrier; hence, even assuming the owning company to be transporting its own oil, it would be subject to the tax.—*W. Meische-Smith et al.* v. *Wardell,* 286 Fed. 785. See *Bul.* VII, 157.

Review and Relief—Federal Taxes. —The federal district court held that income taxes were to be distinguished from penalties and that injunctive relief would not lie to restrain their collection. The cases of *Lipke* v. *Lederer* (*Bul.* VIII, 28); *Regal Drug Co.* v. *Wardell* (*Bul.* VIII, 114) and *Graham* v. *du Pont* (U. S. C. C. A., Jan. 3, 1923) construing section 3224 of the Revised Statutes were distinguished, and it was held that when a taxpayer has an adequate remedy at law to recover back a tax, if paid, a suit to restrain is prohibited by that section.—*Black* v. *Rafferty,* U. S. D. C., N. Y., Feb. 14, 1923.

Interstate Commerce—Transportation of Petroleum. — After the United States Supreme Court had reversed the West Virginia state court and held the tax on the transportation of oil by pipe lines invalid, to the extent that it was sought to be applied to a stream of oil mainly flowing out of the state but containing some oil which was diverted from the stream and delivered within the state, the state court, in obedience to the mandate, entered judgment holding the entire tax invalid. The state authorities felt that this was not in accordance with the mandate and sought to obtain a specific form of judgment. This action was induced by a passage in the opinion in which it was observed that "It is admitted that the tax may be levied in respect to the last item [intra-state shipments] but the question before us is whether the tax can be levied upon the whole product of the state upon which was imposed the gathering charge." This language was urged as imposing the duty upon the state court of so shaping its decree as to enable the state to collect a privilege tax upon the intrastate shipments.

The court held that it could not agree to this; that the language was used merely to describe the character of the various shipments and their classes, and not to indicate the form of the decree to be entered. The classes of shipments thus described were of three kinds—those wholly interstate; those wholly intrastate, and those commingled in the general stream without definite destination but subject to

diversion from the stream at points in the state and which the evidence showed were so diverted.

The tax was laid upon all transportation which the court held a taxation of interstate commerce with respect to the last class above described. The court observed that it had given no consideration to the question of the divisibility of the tax and whether a part of it could be sustained; that this was a question for the state court to decide; that when it reversed the decision of the state court with respect to the last class, holding that to apply the tax to it was to tax interstate commerce, it did not attempt to say whether the whole tax was void; the state court was at liberty to pass upon that question and evidently did so, by holding that the tax was wholly void.

The importance of the decision, therefore, lies in the reiteration of the ruling that a stream of oil in transit, consisting mainly of oil destined for delivery in another state, but containing some shipments subject to diversion and to delivery at points in the state of origin, is a movement in interstate commerce in its entirety and the entire stream is immune from the operation of state taxation upon its transportation. *Hallanan et al.* v. *Eureka Pipe Line Co.,* U. S. Sup. Ct., Apr. 9, 1923. See *Bul.* VI, 256; VIII, 130.

License — Interstate Commerce— Steamship Agents.—Under the ordinance of a Louisiana municipality a license tax was imposed upon steamship agents. The tax was resisted on the ground that it violated the provisions of the federal constitution reserving to Congress the exclusive authority to regulate commerce with foreign nations and among the several states. The business conducted by the steamship agent consisted in representing steamship lines engaged either in foreign or interstate commerce; engaging cargoes for the ships; arranging for the acceptance or delivery of cargo on the wharves; arranging with stevedores for discharging or loading cargoes; issuing bills-of-lading in the name of shipowners; collecting freight charges due the ships; paying the ship disbursements; attending to immigration service; assisting ship captains in the matter of local customs; and remitting to shipowners or charterers the freight charges collected, less the ship disbursements and his commissions. The agent was in many respects the local representative of any shipowner or charterer that engaged his services. The court upheld the tax, on the ground that the business of the steamship agent was a separate and distinct business; that the tax was not a hindrance or regulation of interstate or foreign commerce, as it did not increase the expenses or reduce the profits of the steamship companies represented by the agent; and that the mere fact that the tax might remotely or incidentally affect interstate commerce did not render the tax illegal. — *City of New Orleans* v. *Texas Transport and Terminal Co.,* 93 So. 751.

Oil Inspection Fees — Interstate Commerce. — An Ohio act of 1915 provided for the inspection of illuminating oil and designated fees charged therefor. A dealer brought suit in the federal district court to restrain the execution of the act, alleging its business as interstate commerce and that the fees charged were greatly in excess of the cost of inspection of the interstate shipments and thus repugnant to the commerce clause.

The court upheld the contention, saying that the fees were beyond the legitimate inspection costs and thus the act was a revenue measure and void as applied to interstate commerce, and as that commerce could not be separated from the intrastate shipments the whole tax was void and an injunction was issued.

On appeal to the Supreme Court the contention was that the cost of interstate inspection exceeded the fees charged therefor and that this cost was ascertainable in practical administration. The court contented itself with merely approving the considerations and reasoning of the lower court in holding the contentions untenable and affirmed the judgment.—*Phipps et al.* v. *Cleveland Refining Co.,* U. S. Sup. Ct., Apr. 9, 1923. See *Bul.* VIII, 29.

Inheritance, Federal — Joint Property. — A husband and wife acquired certain real and personal property as joint tenants, with the right of survivorship, prior to 1916, the wife paying no part of the purchase price of such property. Upon the death of the husband, the federal tax was computed on one-half of the joint

property, which tax was paid. Subsequently the government imposed an additional tax based on the other one-half, claiming that the act of 1916, making the interest of decedents in jointly owned property taxable, was retroactive. The district court held the additional tax invalid, citing the United States Supreme Court decisions of *Schwab* v. *Doyle* (*Bul.* VII, 295) and *Knox* v. *McElligott* (*Bul.* VII, 296).—*Walker* v. *Grogan,* 283 Fed. 530.

Inheritance, State — Progressive Rates—Constitutionality under Uniformity Clause. — The New Hampshire court, at the request of the legislature, recently rendered its opinion, holding that a proposed graduated inheritance tax upon the transfer to lineal descendant would be in violation of the constitutional provision requiring uniform and proportional taxation; that the authority to enact an inheritance tax designated it as a property tax and as such it must conform, as far as possible, to the provision of the constitution requiring in the taxation of property a proportional valuation and a uniform rate, which would be violated by a property tax graded by the amount of the property. The prior decision upholding the existing tax on collateral inheritances was explained upon the ground that its enactment disclosed an intent on the part of the people to subject themselves to the disproportionate, unequal and double taxation necessarily involved and which could not be avoided if the tax were to be imposed. This law was then held to be an equal law as applied to all persons alike and the exemption of lineals was supported on the familiar rule in the jurisdiction that only such property was taxable as the legislature made so.

Holding that as the inheritance tax authorized by the constitution was regarded, perhaps incorrectly, as a property tax, and as such it could be made uniform upon all property taxed, this must be done, to avoid conflict with the clause requiring uniform and proportional taxation.—*In re Opinion of Justices,* N. H. Supreme Court, April 2, 1923.

Inheritance, State—Deed of Trust. —A Massachusetts resident executed a deed of trust, in which he divested himself of title to the property conveyed, reserving the power to make additions to the trust funds, to change or alter them in any way, except such as would vest himself with any beneficial interest therein, and to change the beneficiaries or trustees. Upon his death the state sought to collect a tax upon the life interests of the beneficiaries, claiming that such interests constituted interests in property passing by deed, made or intended to take effect in possession or enjoyment after the death of the grantor. The court held the tax invalid, on the ground that the beneficiaries were in possession or enjoyment of the property immediately after the execution of the trust instrument, which was in no way dependent upon the donor's death; that the reservation of the right to change the trusts or beneficiaries did not affect the essential nature of the rights of the beneficiaries as long as they lasted, and that the property did not come within the meaning of the statute, as property passing by deed made or intended to take effect on possession or enjoyment after the grantor's death.—*Dexter* v. *Jackson,* 137 N. E. 877.

Assessment — Timber Land — Local Assessors Powers. — A Louisiana lumber company returned its tract of timber land for taxation at a certain valuation, which was accepted by the board of review. Subsequently the state tax commission increased this valuation for state purposes, basing such increase upon a division of the entire tract into forty-acre tracts and an application of certain values to the various classes of timber thereon. The court reduced the assessment for state purposes to the valuation returned by the company, holding that the practical and reasonable method for valuing timber lands was to value the entire tract as a unit, by estimating the value of the timber and deducting therefrom the cost of logging the entire tract; that such method was the only commercial method in use and should be applied; that the value returned by the company was shown by the evidence to represent the fair and reasonable value of the property.

The parish assessor also increased the company's valuation to that fixed by the commission and the company questioned the legality of the assessment, on the ground that the assessor had failed to exercise his judgment and discretion but had

blindly followed the tax commission. The court held that the facts did not disclose domination of the assessor by the commission, by which he was deprived of the legal right to exercise his judgment in making the assessment and that under the statutes, while it was the function of the commission to originate assessments for state purposes and establish the basis upon which the local assessors must act, such assessors were left free to make local assessments at any percentage of the state assessments they saw fit, provided they were not less than 25% of the actual value fixed for state purposes.—*Crowell-Spencer Lumber Co.* v. *Ward,* 93 So. 678.

Appraisal of Shares — Income Tax Returns as Evidence. — In a Wisconsin inheritance tax case, the state questioned the appraisal of certain stock and offered in evidence a certified copy of the state income tax return of the corporation, which included a balance sheet indicating that the net book value of the stock was considerably in excess of the appraisal. The evidence was excluded, the court holding that the income tax returns reflected mere entries on the books and did not necessarily show the actual value of the stock and such entries, as to the stockholders, were mere hearsay; that such returns might not be admitted, as the statute permitted their admissability only in civil or criminal proceedings pertaining to such returns and not otherwise.—In re Porter's Will, 190 N. W. 473.

Exemption—Educational Purposes.— In a proceeding in the Minnesota courts to enforce the payment of delinquent taxes against real estate owned by a college, the defense was interposed that the property was exempt from taxation. The property consisted of a farm adjoining the campus, the produce of which was used to supply the college dormitories, and upon which a dormitory for students and a dwelling for caretakers were located; a dormitory located a short distance from the campus; buildings occupied by the faculty and located outside the campus and a farm some distance from the college which was not necessary for the present purposes of the institution. The court held that all of the property, except the farm, was exempt, on the ground that it was reasonably necessary for the accomplishment of the educational purposes of the institution.—*State* v. *Carleton College,* 191 N. W. 400.

Exemption — Hospital. — Exemption was claimed for certain Illinois real estate, used as a hospital, open to all and not conducted for profit, owned by a religious organization. The court held that the property was not exempt from taxation as it was not used for religious purposes; that a different question would have been presented had such property been owned by a hospital organization.—*People ex rel. Wilson* v. *St. Mary's Roman Catholic Hospital of Centralia,* 137 N. E. 865.

Exemption — Monastery. — Certain Illinois real estate was owned by a Catholic diocese and was used and occupied by an order of nuns as a monastery. The nuns had no activities or duties in connection with the public and depended for their support on charity. A small part of the monastery was used as a chapel for the use of the public. An assessment on the property was resisted, it being claimed exempt. The court held that as the primary use of the property was not for public purposes, it was not exempt from taxation.—*Peo. ex rel. Carson* v. *Muldoon,* 137 N. E. 863.

Manufacturing Purposes — Electric Plant.—An Illinois public utility corporation bought electric current from another company and distributed it over its own poles and wires to its customers. It resisted an assessment of its capital stock, claiming that it was engaged in a purely mercantile and manufacturing business, and was therefore exempt under the statute, from capital stock tax. The validity of the assessment was upheld by the court, which held that mercantile and manufacturing corporations were quite different in character from public utilities, which formed a special class, and that an electric light plant, however the company was organized, was not a manufacturing corporation, within the meaning of the statute. — *People ex rel. Mercer* v. *Wyanet Electric Light Co.,* 137 N. E. 834.

Mortgage Recording Fee. — In the course of the trial of an action at law in the Minnesota courts to recover an instalment due under a contract for the sale of real estate, under which the vendee was

entitled to possession, the vendee objected to the admission of the contract in evidence, on the ground that the registration tax had not been paid, whereupon the vendor paid the tax. The court held the contract admissible, as the tax might be paid during the trial.—*Benjamin* v. *Savage*, 191 N. W. 408.

Classified Tax in Nebraska—When Effective. — An amendment to an existing Nebraska statute requiring the separate listing of money and credits and making them taxable at twenty-five per cent of the rate upon tangible property, went into effect July 28, 1921, when the listing of taxable property had been completed, but before the tax levy for the year had been authorized. The question arose whether the amendment applied to the taxes of 1921. The court held that the status of the listing for 1921 was as of April 1, and that it was not affected by the amendment, since the amendment was prospective and applied to subsequent assessments. — *Adair* v. *Miller*, 190 N. W. 865.

Income, Federal—Income from Reorganizations—Liquidating Dividends—Distribution of New Securities.—The Supreme Court has drawn the net a little closer around "reorganizations", in interpreting the federal income tax, so that escape of income from tax by such devices appears less easily accomplished. The case arose under the act of 1916, and hence the decision does not affect similar transactions under the 1921 act.

A Texas corporation had in 1915 a capital stock of $100,000, of which the litigant held 26.64 per cent, for which he had paid $26,640 in cash. In that year the corporation was dissolved and the litigant became one of the trustees in dissolution. In 1916 the trustees organized two Texas corporations, one a petroleum-producing concern and the other a pipe-line concern, and transferred to those corporations the assets of the dissolved corporation, one-half in value to each. From each they received $1,500,000 par value of its stock and $1, 500,000 of its bonds, being the total issues. They also organized a Delaware holding company and transferred to it all the stock of both corporations, receiving $3,000,000 of its stock. They thus held in 1916 $3,000,000 stock of the Delaware company and $1,500,000 bonds of each of the Texas companies. They then distributed these securities *pro rata* among the stockholders of the dissolved corporation. The litigant thus received an aggregate face value in securities of $1,598,400, for which he had paid in cash $26,640, as noted above. On the difference the tax was assessed, to recover which suit was brought.

The dissolution of the original company had been carried out solely for the purpose of effecting a reorganization, partly to separate the production properties from the pipe lines, as was deemed legally necessary, and partly to procure credit for developing the business. The two new Texas companies had at the time of distribution of the stock of the Delaware holding company no assets other than those received from the trustees. These assets were then of the same value as when received by the trustees. The aggregate value of the shares and of the bonds distributed was apparently admitted to be the same as the par value thereof.

It will be seen that the question at issue was whether this transaction was a mere change in form of the litigant's interest in a corporation such as would arise from the declaration of a stock dividend, from which no income could be held to arise, as decided in *Eisner* v. *Macomber*, 252 U. S. 189; *Bul.* V, 179, 247, or whether there was in effect a separation of income from capital, as was held to be the case in *U. S.* v. *Phellis*, 257 U. S. 156; *Bul.* VII, 85, and *Rockefeller* v. *U. S.* 257 U. S. 176; *Bul.* VII, 86.

The litigant, of course, insisted that the gain nominally accruing to him was merely an incident of a reorganization and that the distribution by the trustees was not a dividend paid out of surplus, as in the *Phellis* and *Rockefeller* cases. The court held that those cases also involved reorganizations and that a gain which if segregated becomes income, may be segregated by a dividend in liquidation as well as by an ordinary dividend. It observed that if, for instance, the trustees had sold the assets and distributed the cash, no one would have disputed the fact that the stockholders would have derived gain, and that the same effect would have arisen if the trustees had taken in payment and distributed bonds of the value of the assets sold; the same result, it said, must be true where the distribution is part bonds and part

stock. The features differentiating the two cases above noted from the *Eisner* case were held to be present; the new company whose stock was distributed was a holding company and thus differed from the dissolved company, which was a producing company; it was also organized under the laws of a different state; while it was true that the stock of the holding company represented the same assets as that of the dissolved company, the holding company was free to dispose of the whole or any part of the stock of either of the companies—and by such a sale and change, all interest of the holding company in the original enterprise could be parted with, without in any way affecting the rights of its own stockholders. Those facts were held to bring the case within the class of cases where the segregation was such as to render the taxpayer virtually able to realize a gain at will.

This decision appears to reduce the cases where no gain is to be deemed to arise from a reorganization to those where there is an *actual* continuation of the identical business and possibly to those where the new securities issued by a corporation taking over such a continuing business can be proven to be of no greater actual value in the aggregate than the aggregate of the securities of the predecessor corporation. It is not possible to determine this question with certainty, in the absence of definite decision by the court.—*Cullinan* v. *Walker,* U. S. Sup. Ct., Apr. 30, 1923.

EXEMPTION — CONTRACT CLAUSE OF FEDERAL CONSTITUTION — INCOME TAX HELD NOT A TAX ON CAPITAL VALUE PROHIBITED.—Decision has been rendered by the United States Supreme Court of the appeal by a taxpayer from the action of the New York tax department in including as taxable income interest received by the taxpayer from bonds upon which the recording tax had been paid and also from securities upon which tax had been paid under a prior law. It was claimed that payment of these taxes upon the bonds and securities rendered them thereafter exempt from all taxation, and hence exempt from the income tax levied upon the income therefrom. The state courts confirmed the action of the department, rendering no opinions, but from the record the Supreme Court found it evident that the taxes were sustained upon the ground that there was no violation of the contract clause of the federal constitution and prefaced its consideration of this question by observing that it should be slow to depart from the conclusion of a state court when dealing with a matter of local policy, like a system of taxation, if there was no real oppression or manifest wrong involved in the result reached by the state court. (*Troy Union R. R. Co.* v. *Mealy,* 254 U. S. 47, 50.)

The mortgage recording tax law provided that all mortgages taxed thereunder and the debts secured thereby should be exempt from other taxation. The court referred to the caution which should be exercised in construing such declarations of legislative policy as promises, expressed in *Wisc. & Mich. Ry. Co.* v. *Powers,* 191 U. S. 379, 386, and to the holding of the state court that, even assuming a contract of exemption, such contract did not extend to the income tax but only to taxes upon capital value; that while for many purposes a tax upon the interest received would be a tax on the mortgage, for the mere purpose of construing a statute a distinction might be taken, which the Supreme Court approved. The conclusion of the state court in this respect, the supreme court found reached without difficulty, observing that the state did not need to offer a bargain to induce mortgagees to record their deeds. (*Fed. Land Bank* v. *Crossland*, Mch. 19, 1923; *Bul.* VIII, 218.)

The tax on the secured debts was one-half of one per cent on the face value, upon payment of which certificate was made by endorsement that they should be exempt from taxation thereafter. Failure to pay this tax subjected the owner to an alternative tax upon the market value, at the full local rate. In the absence of further opinion by the state court, the supreme court assumed it fair to consider that the state court sustained the tax as against claim of violation of a contract, upon the same ground that it had held that no contract was violated by the taxation of interest from mortgages discussed above, that decision having been rendered at the same time as the one involved here. (*N. Y. ex rel. C. U. Trust Co.* v. *Wendell,* 197 App. Div. 131; *Bul.* VI, 280.)

The opinion closes with another reference to the reluctance of the court to depart from the judgment of the court of a state in such cases.—*N. Y. ex rel. Clyde* v. *State Tax Commission,* U. S. Sup. Ct., Apr. 30, 1923. See *Bul.* VII, 200.

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SIXTEENTH ANNUAL TAX CONFERENCE

White Sulphur Springs, W. Va., September 24-28, 1923

General Invitation

This conference is, as usual, absolutely open to all interested in taxation, federal, state and local, and in the consideration of all questions which concern the collection and expenditure of public funds. A cordial invitation is extended to all to attend and participate in this conference, whether members of the association or delegates, or not. The customary invitation has been extended by Governor Morgan of West Virginia to the chief executives of the other states, the possessions and the Canadian provinces, to appoint official delegates and these executives will undoubtedly be glad to be informed of those who would be interested in attending the conference and would appoint such as delegates.

Definite benefit will be derived from the participation of those not heretofore identified with the work, who would add to the interest, through the new viewpoints thus developed. While the voting upon definite resolutions is necessarily confined by the by-laws of the association to official delegates representing states, territories, possessions, provinces and universities, the discussion is entirely unlimited.

The Place—Transportation

The conference will be held at the Greenbrier, a hotel situated at White Sulphur Springs, West Virginia, near the Virginia state line, on the main line of the Chesapeake and Ohio railroad. Through train service is afforded from New York, Norfolk, Richmond, Cincinnati, Louisville, Chicago and St. Louis, at which points connection may be made with the numerous trunk lines. The Chesapeake and Ohio railroad is also intersected at other points by the Southern Railway, the Carolina, Clinchfield and Ohio Railway, the Louisville and Nashville, and the Queen and Crescent route, thus affording ready access from the south; while the Norfolk and Western railroad, the New York Central system and the Baltimore and Ohio railroad afford access from northern points. The steamers of the Old Dominion Line between Norfolk and New York will afford a pleasant variation of the trip.

The Time

The conference will open on Monday evening, September 24, and extend to Friday afternoon. It is hoped this year to limit the sessions to two daily, thereby affording opportunity for informal discussions and for recreation and enjoyment of the beauties of the region.

At the opening session on Monday evening, September 24, organization will be effected and greetings from Governor Morgan will be extended.

Headquarters

The Greenbrier, as is well known, is a large modern hotel, celebrated as a resort, both summer and winter. It is equipped with every convenience and is especially adapted to our conference requirements.

Hotel Rates

In arrangement, the rooms at the Greenbrier are especially adapted for one or more persons to share the same bath, for the reason that each room has a separate lavatory and toilet where there is a bath between. The following special reduced rates for accommodations apply to our conference, meals being included, namely:

Double room with twin beds and private bath, the bath to be shared by only two persons in that room, $9.00 per day per person.

Double room with twin beds, and single room, with bath between, each room having its own lavatory and toilet, $9.00 per day per person.

Two single rooms with bath between, each room having its own lavatory and toilet, $9.00 per day per person.

Single room with bath, where specifically required, $12.00 per day.

Single room without bath, but having lavatory and toilet (and having to use public bath), $8.00 per day.

Applications for accommodations should be addressed to Mr. Harry Tait, Resident Manager, The Greenbrier, White Sulphur Springs, West Virginia.

Those desiring special information about the hotel, or other matters, may communicate with former State Tax Commissioner Walter S. Hallanan, Charleston, West Virginia, through whose kind offices the above arrangements were perfected. Mr. Grant P. Hall, the present Commissioner, who has recently taken office, is actively cooperating with Governor Morgan in promoting the success of the conference and will be pleased to extend assistance, as requested.

In making reservations, it cannot be too strongly emphasized that details often neglected be furnished; these include the exact time of arrival, the names in full of those covered in the request, the character of the accommodations desired and exactly how the rooms are to be occupied.

Program

A decided departure from previous conferences will be attempted, in that the number of specially assigned topics will be curtailed. The great advantage of general discussion and of the suggestions which arise in informal debate and in question and answer, has often been demonstrated, but the pressure of numerous definite subjects demanding attention has heretofore seemed to necessitate at least formal treatment of many subjects through special papers. This method of approach is by no means to be deemed discarded, but for this particular conference the officers have thought it wise to make a definite departure and to assign one session each day to the so-called "round table", such as it has been customary to have at a single session at previous conferences.

This procedure will require the greatest attention on the part of those in attendance in order that it may be helpful and may furnish the greatest benefit to the participants. The exact method of reaching the desired results is something which will be developed prior to the conference, through correspondence with the various states.

It is suggested that perhaps an effective way to accomplish the desired purpose would be by reference to the tax legislation that has been proposed and discussed at this year's various sessions of the legislatures. The number of sessions held this year has undoubtedly brought about a discussion of a great variety of questions. The contentions of the proponents and of the opponents of these measures may well be brought before the conference for deliberation, in the light of sound fiscal principles as developed by the study and experience of those interested in the work of

this association, free from the miscellaneous limitations and considerations which obtain in the heat of a legislative session.

As indicated, our purpose will be best promoted if as large a number of persons as possible will communicate with the secretary their suggestions for the conduct of the proposed discussions, giving in as concrete form as possible those questions which have recently arisen in their particular states with definite references to the character of the differences which appeared. These communications may be classified and a number of topics may be thus selected for our consideration.

In view of the above observations and of the general scope of this conference, it is not feasible at this time to list a definite program for each session. An outline of such specific topics as are under consideration for specially prepared addresses, and a reference to some of the more outstanding problems that have seemed to present themselves to the various legislatures will be mentioned, and as the program assumes more definite form, special announcements may be issued.

West Virginia Problems

As usual, the questions of immediate importance in the state visited will be considered. Governor E. F. Morgan has consented to address the conference. Undoubtedly continued interest exists with respect to the late developments in the administration of the West Virginia sales tax, to which attention was directed by tax commissioner Hallanan at the last two conferences.

Public Utility Taxation

The committee work of the association will be reflected in what is hoped will be the final report of the committee on the apportionment between states of taxes on public service corporations. Senator Davenport of New York, chairman of the committee, is actively engaged in perfecting this report.

Standardization of Reports of Tax Commissions

A report will be made by the committee on the standardization of annual reports of tax commissions which was authorized at the last conference. Mr. Mark Graves of the New York State Tax Commission is chairman of that committee. The importance of this subject, which is a new one, will be evident to all who have had occasion to realize the advantages to be gained from comparative statistics of the operation of similar laws in different states and from the information as to tax conditions generally in the various states, through uniformity in expression and treatment.

Simplification of State Administration

A subject of growing importance, because of the breadth of its scope and of its direct relation to the work of state tax commissions in general, is the effect of the various plans for simplification in the administration of state governments, perhaps described by the expression the "short ballot." There is widespread approval of the general purposes of this movement, but its detailed application to the administration of tax laws is naturally something which is of definite interest to those who have been concerned with the work of this association. For the discussion of this topic we are fortunate in securing the participation of Mr. Luther H. Gulick, of the New York School of Public Administration.

Assessment of Real Estate

Criticism has at times been directed at this association for the generality and perhaps theoretical nature of its discussions. It has been said that the practical everyday work of the assessor has been neglected. To meet this suggestion a discussion is planned of the assessment of city and country real estate. Much has been accomplished in the technique of this branch of tax work and a discussion of it will undoubtedly be of great practical interest. Its discussion will also naturally lead to the closely connected topic of equalization in the assessment of property made by separate assessing bodies within a given state. This latter phase is suggested by the heated and extensive litigation which has recently arisen in various localities, due to the asserted inequality in railroad assessments as compared with assessments of real estate generally.

Bank Taxation

Undoubtedly the officials of the various states will be greatly interested in comparing notes on the taxation of banks, in view of the recent amendment of Section 5219 of the United States Revised Statutes. The interpretation of this amendment, its effects in various states and the experiences in the enactment of statutes in conormity with it, will naturally be of interest.

State Excise Taxes and the Commerce Clause

The litigation in Pennsylvania, Minnesota and perhaps elsewhere with respect to special taxes on mining, resulting in recent important decisions by the United States Supreme Court, led to the suggestion that some definite consideration of the status of occupation taxes in general, in their relation to the commerce clause of the federal constitution would be timely. The decisions referred to seem to emphasize the need of some authoritative statement of the present state of the law. If, for instance, the occupation taxes, sales taxes or excises in general may not be applied with justice and equality as among different classes of business, because of the limitations of the commerce clause, such a situation requires immediate and careful attention, because of widespread tendency to resort to such taxes, as direct taxes on real estate have reached their present burdensome proportions.

Federal Taxation

The federal tax situation, both from political and fiscal aspects, is such as to demand consideration by our conference. It is the intention to secure a discussion of the subject by some member of the committees of Congress specifically concerned with the matter and also, if possible, by some official of the Internal Revenue Department. We are assured of the presence of Congressman Ogden L. Mills and hope that Commissioner of Internal Revenue Blair and Chairman Greene of the House Ways and Means Committee may favor us in this connection. The views of Dr. Adams upon the fundamental needs in the reform of federal taxation will form the subject of his presidential address, the title for which he tentatively fixes as "Revolution vs. Evolution in Federal Tax Reform."

"Tax Free" Amendment of Federal Constitution

A subject distinctly connected with federal taxation, through the graduated income tax, is that suggested by the proposed amendment to the federal constitution, designed to eventually discourage the issuance of tax-free securities, federal and state. The adoption of this amendment by one branch of Congress renders it altogether likely that it will be a prominent subject before the next Congress. This association is in a sense committed to the full discussion of this matter and to the duty of announcing its conclusions. Congressman Ogden L. Mills will lead the discussion.

Review of Legislation

The feature which has formed a permanent part of our program is the review of state legislation. We are fortunate again this year in having this review presented by Mr. William E. Hannan of the New York State Library. It will naturally form the basis for the "round table" discussions above referred to, supplemented by such suggestions as are received concerning measures which were not adopted but which received important consideration.

Miscellaneous Subjects

Among the matters which would seem to provide interesting topics at the "round table" discussions are the following:

State income tax amendments, including, for instance, the publicity of income tax returns, as provided in Wisconsin.

Miscellaneous excise taxes, such as those recently imposed in South Carolina.

The demands of public education and their tax reactions.

Classified vs. general income taxes.

Relation of property taxes to income taxes, including "double" taxation.

Control of expenditures and limitation of taxes.

The request for cooperation on the part of the members of the association and of all others interested is urgently repeated. Suggestions in this respect will be very gratefully received.

A. E. HOLCOMB,
Secretary,
195 Broadway, New York, N. Y.

INCOME TAX CHANGES*

Important changes were made in the income tax law in 1921 in order to minimize the deterrent effect of high and sharply progressive surtax rates upon the sale or exchange of property. The Revenue Act passed in that year introduced a very liberal clause in connection with the exchange of productive or investment property. It also sets a limitation upon the tax rate on profits from the sale of investments held more than two years. The operation of these provisions has not been satisfactory to the Treasury, and the Secretary in his report for 1922 recommended changes intended to safeguard the revenue against what he considered abuse of these tax-saving opportunities. Congress accepted the suggested modification with respect to exchange of property, but did not enact any change in the two-year investment clause.

The 1921 law provided that no taxable gain or deductible loss should result from the exchange of productive or investment property for other property of like kind or use. Difficulties of interpretation were at once apparent, but the Treasury by formal regulation took the position that the statute permitted the exchange of such property as bonds for other bonds or stock for other stock without tax liability. In fact, a trader might receive without tax liability a cash difference up to the amount which the original property had cost.

This provision, of course, did not necessarily have the effect of permanent tax exemption, but rather operated to postpone the time of taxing any appreciation in value until the property received in exchange should be sold. In some instances, no doubt, the property so received passed into trusts or estates, and the appreciation never became taxable under the income tax law. The Secretary's chief criticism of the working of the provision, however, was that brokers and investment houses were advertising that they would exchange securities in a manner which would avoid the tax, and that the exchange provision was availed of only in the case of securities which had appreciated in value. In the case of those which had depreciated, the securities were sold outright and the loss immediately deducted. Consequently, the Secretary recommended that the cases in which non-taxable exchanges of securities might be effected should be limited to those where the exchange is in connection with reorganizations, consolidations and mergers of one or more corporations.

Just before its expiration the Sixty-seventh Congress amended Section 202 of the Revenue Act of 1921 in accordance with the recommendations of the Treasury. The revised section provides in effect that exchanges of stocks, bonds, notes, choses in action, certificates of trust or beneficial interest, or other securities or evidences of indebtedness or interest shall constitute closed transactions, resulting immediately in taxable gain or deductible loss, except in the case of exchanges incident to corporate reorganizations. The amendment is effective as of January 1, 1923.

Secretary Mellon also returned in his report to the subject of tax-exempt securities. He has frequently expressed the view that this avenue of escape from the income tax should be narrowed by constitutional amendment restricting further issues of such securities. The Secretary insists that the inducement to invest in these securities is unduly strengthened by the high surtax rates now obtaining. To the pressure exerted by these high rates he justly attributes much of the effort to avoid taxes by artificially reducing the amount of taxable income. No significant effort was made in Congress to reduce these rates, but a bill authorizing the submission of an amend-

* Reprinted from *Commerce Monthly,* June, 1923.

ment to restrict the issuance of tax-exempt securities got as far as passage by the lower house.

Since the expiration of the Sixty-seventh Congress on March 4, the argument for reduction of rates has been strengthened by the indicated increase in the yield of income taxes. Collections during the months of March and April, 1923, exceeded those of the corresponding period of 1922 by $100,000,000. The business revival has, of course, played a part in this increase, but Treasury authorities believe also that the modified surtax rates for 1922 decreased the incentive to tax-avoidance and thus favorably affected the yield.

STATISTICS OF INCOME FOR 1921

The Treasury Department has recently issued a preliminary report on the personal income tax returns for the year 1921. This report does not contain the material for comparison with earlier years, but it may be of interest to note certain points of contrast with the results for the year 1920. A summary of the personal income tax statistics from 1917 to 1920 was presented in the *Bulletin* for November, 1922 (Vol. VIII, p. 35).

The effect of the depression in lowering the level of incomes is seen in the shrinkage of both the number of returns and the volume of income for 1920. There were 6,662,176 personal returns in 1921, a loss of 597,768 as compared with 1920. This shrinkage is distributed throughout all income classes, as is to be expected in a period of lessened business activity and declining incomes. The effect of the depression is apparent also upon the volume of net income reported, which was $19,577,212,528, a loss of $4,158,000,000.

It is interesting to note, however, that by far the greater part of the shrinkage in personal income occurred in the incomes from personal service, rather than in those from property. That personal service income which is classified in the statistical reports as salaries, wages, commissions, bonuses, etc., declined about $1,457,000,000, and that derived from business, trade, commerce, partnership, and incidental sale of securities and other property, diminished by about $1,757,000,000. These forms of income were 77.09% of the total income reported in 1921, as against 79.42% in 1920. In the case of the property incomes, a loss of $259,000,000 in dividends and of $19,000,000 in interest on bonds, etc., was offset by an advance of $170,000,000 in rents and royalties, so that the net decline of the incomes from property was about $147,000,000.

The preliminary report for 1921 contains figures covering the returns of net income in amounts less than $1,000. The earlier reports had not made this segregation. The total tax on the income class below $1,000 was $173,678, which indicates that the elaboration of the statistical material at this point will be of greater interest to those who may be concerned with the broader social aspects of income taxation than to those concerned primarily with the fiscal results. The total tax yield for 1921 was $719,387,106, as compared with $1,075,053,000 in 1920, and with $1,269,630 in 1919. A further point of elaboration of the 1921 figures is the presentation of tables showing the number of personal returns by counties, and for all cities having a population of 5,000 or over. The numbers here are determined by approximation rather than by precise count of the returns. The preliminary report will be followed later by a more complete statistical summary, which will include a summary of the returns filed by partnerships and corporations.

CORPORATION TAXES IN WISCONSIN

REPORT OF WISCONSIN TAX COMMISSION IN RESPONSE TO RESOLUTION OF THE ASSEMBLY CALLING FOR A STATEMENT OF TAXES PAID BY WISCONSIN CORPORATIONS IN COMPARISON WITH THOSE PAID BY CORPORATIONS OF OTHER STATES, AND FOR THE EFFECT OF THE INCOME TAX LAW ON INDUSTRIAL DEVELOPMENT.

On the 6th day of February, 1922, the Assembly adopted a resolution requesting the tax commission to furnish information from all available sources, including the United States census, as to (1) the amount of taxes which corporations have to pay in Wisconsin cities as compared with taxes paid by like corporations in similar cities of Illinois, Michigan, Minnesota and Massachusetts, and (2) the effect of the income tax law upon progress of manufacturing in Wisconsin since the date of its enactment and particularly as to whether this tax has driven industries out of the state.

This resolution was certified to the tax commission on the 8th day of February following and immediately thereafter the tax commission applied to the federal census bureau and to the fiscal departments of several states for all information available on the subject. The census bureau replied that the statistics from the 1920 census on the subject of "wealth, debt and taxation" had not yet been compiled and that the only information available was that contained in the bulletins on the financial statistics of cities previously issued which the commission already had. No definite information was received from the states to which application was made except their total tax levies for earlier years, and no information at all could be secured as to the effect of an income tax, or indeed of any tax system, in either promoting or retarding industrial development.

No reliable comparison can be based upon taxes paid by specific corporations in cities of Wisconsin and other states because of the diversity in the organization, capitalization and management of different corporations even when engaged in the same line of business in the same or different states and cities. Just as wide differences can be shown in the tax burdens of corporations in the same cities as in those of different cities, depending upon the differences in the lines of business in which they are engaged and in their organization and management. For example, an analysis of reports received from local and county clerks on the tax levies in all Wisconsin cities for the year 1921 shows a per capita range of from $15.85 in the city of Hartford and $17.57 in the city of Portage to $32.00 in the city of Hudson and $29.28 in the city of Oconomowoc — all cities in the same general class. The per capita cost for that year was $33.59 in the city of Superior as against $20.51 in the city of LaCrosse and $22.27 in the city of Green Bay. West Allis had a per capita cost of $35.07 as against $17.30 in the city of Stevens Point. All these cities are operating under the same tax system and the difference in their tax burdens could not be ascribed to that cause. The same diversity appears in cities in other states as well as between cities of different states, according to reports of the federal census bureau. It is, therefore, wholly impractical to base any comparison upon the taxes paid by specific corporations or in selected cities in different states. Selections could be made to show any result desired. In this situation the only proper basis of comparison is the average weight of the tax burden either for entire states of the same general character or the average for all cities of the same general class, and this information may be based upon either the aggregate tax levies for a period of years or upon the average expenditures.

The tax commission has endeavored to collect information on these two bases and herewith submits (1) tables showing the aggregate tax levies for Wisconsin and the four surrounding states for a period of five years past based upon its own investigation, and (2) tables compiled from the federal census bulletins as to both the revenue receipts and cost of government in all

cities of the same general class in ten different states. A table containing a summary of the aggregate tax levies for Wisconsin and the four surrounding states for the years 1917, 1918 and 1919 was submitted in our 1920 report to the legislature. Like information has since been secured for the years 1920 and 1921, covering in all a period of five years, which is submitted in the following Table I: *

nois had the lowest per capita tax of the entire group for every year.

The per capita of all taxes levied was less for Wisconsin than for any of the other states except Illinois for the entire period and Minnesota for the year 1921. The general property tax levy for Wisconsin is lower than that for any of the other states for each of the years in question but the taxes derived from other sources are higher than for the other states, clearly indicating that to the extent revenue was derived from other sources the burden on general property was reduced. These figures run so close together and the increase for the period is so general as to demonstrate that any difference in the tax systems of these different states had no material bearing on the aggregate amount of taxes raised.

TABLE I

TABLE SHOWING AMOUNT OF REVENUE DERIVED FROM 1917 AND 1921 TAX LEVIES PAYABLE IN 1918 AND 1922

	Population	*General Property Tax*	*Other Taxes*	*Total Taxes*	*Per Capita Taxes*
		1917 Levy (millions)			
Illinois	6.2	$148.6	$5.8	$154.4	24.86
Iowa	2.2	62.3	1.1	63.5	28.56
Michigan	3.1	77.6	6.3	83.9	26.95
Minnesota	2.2	61.5	9.4	70.9	30.87
Wisconsin	2.5	50.1	14.3	64.4	25.38
Average of per capita taxes	..	.....	...	.....	27.38
		1921 Levy (millions)			
Illinois	6.4	235.4	9.4	244.9	3[illegible].77
Iowa	2.6	104.2	3.0	107.2	44.62
Michigan	3.6	155.9	12.8	168.7	46.02
Minnesota	2.3	104.1	12.0	116.1	48.67
Wisconsin	2.6	97.1	20.7	117.9	44.79
Average of per capita taxes	..	.....	...	.....	44.37

The first column of this table gives the population as estimated by the federal census bureau for the year 1917, and the population according to the census for 1921. The second column shows the aggregate general property tax levy for Wisconsin and for the four adjoining states for each of the years in question. The third column shows the aggregate receipts from all other forms of taxation, the fourth column the total amount of taxes of all kinds raised in each of these states for the years in question, and the fifth column gives the aggregate per capita tax levies in each state for the several years. It will be observed that the per capita for Wisconsin was less than the average for the five states for the year 1917 but slightly above the average for the year 1921. The per capita tax for Iowa was higher than for Wisconsin for three years of the period, and the per capita for Michigan and Minnesota was higher than for Wisconsin every year except for 1920, when the Michigan figures were slightly less. Illi-

* Figures for 1918, 1919 and 1920 omitted.

The soldiers' bonus surtax and motor vehicle license are excluded in each case for the reason that the former was raised for a special and temporary purpose and paid in varying amounts. If included, the item would destroy the comparison of the normal cost of government between the states and for prior and subsequent years. Motor licenses are excluded because they are levied under the police power and are not taxes in the strict sense of the term. Revenue from that source has been comparatively light in Wisconsin heretofore, and we suffer rather than gain by the omission. An item of special assessments for highways purposes is included in the figures for Iowa for the years 1920 and

1921 for the reason that a portion of the cost of secondary roads in that state is defrayed by special assessments on abutting farm property and corresponds with the amount paid by general taxes in the other states. No departmental earnings or borrowed money are included in any case. In other words, the total represents the amount of the aggregate tax levy exclusively.

The report proceeds to analyze the revenue receipts and the governmental cost payments for the cities in these states which are included in the reports of the census bureau. This discussion is summarized by the Tax Commission as follows:

"An examination of the foregoing data and all other available information cannot fail to impress the impartial student that the tax record for Wisconsin for the last five years affords neither grounds for boastfulness nor complaint. The tax burden in this state is higher than in some states but lower than in many others. It is higher in some cities in Wisconsin than in like cities in other states and it is also lower in many Wisconsin cities compared with like cities in other states. Compared with either states or cities of the same general character both the increase and the weight of the tax burden are approximately the same. Lower taxes can be found in nearly all the southern states; higher taxes can be found in nearly all the Pacific and Rocky Mountain states and in several of the eastern states. Both in respect to the weight of the tax burden and the rate of increase, the status of Wisconsin is practically that of the average. There is no evidence whatever that either of them has had any appreciable effect in either promoting or retarding industrial development in any of the states.

The same disparity in the tax burden that exists between cities of like size in different states can be found in cities within the same state. For example, the net operating per capita cost of government in Lowell, Massachusetts, for 1919 was $32.25 as against $32.08 in the city of Springfield and $38.19 in the city of Holyoke. The total expenditure in Terre Haute, Indiana, for 1919 was $17.08 per capita as against $23.91 in Fort Wayne and $26.60 in South Bend. Among the smaller cities of the state of Michigan, the net operating expense for 1921 ranged from $24.52 in Kalamazoo to $33.09 in Battle Creek and $48.54 in Highland Park. Illinois shows a similar range for the same year of from $17.95 per capita in Decatur to $33.22 in Evanston and $22.11 in Peoria. Similar illustrations could be drawn from any state in the union. A much more plausible deduction from the census reports is that industrial development is to be found in states and cities of relatively high taxation for the obvious reason that such activity itself occasions increased expenditure.

INDUSTRIAL DEVELOPMENT SINCE THE INCOME TAX LAW WAS ADOPTED

Whatever the weight or increase of the tax burden in Wisconsin may be in comparison with that of other states, a much more important question is the progress of its industrial development since the income tax law was adopted. This is one of the significant questions submitted by the Assembly and, fortunately, reports of the census bureau contain reasonably definite information on the subject. Here again the question cannot be approached from the standpoint of specific industries nor of individual corporations but must be solved by a survey of the whole field of industrial development. Whenever a new law or a new policy is proposed or adopted, prophets of evil frequently complain that the effect will be to discourage enterprise and drive industry out of the state—a statement easy to make but seldom supported by concrete facts. Of course, an occasional industry sometimes discontinues, or changes its location or line of business, for a variety of reasons, but we have yet to learn of a single authoritative instance of a Wisconsin industry moving out of the state or refraining from coming into it because of the tax situation. An industry contemplating such a course must either go out of business altogether or find a more favorable location, and this problem cannot be solved by a wave of the hand. It necessitates a comparison of conditions here and elsewhere not only as to taxes but as to many other factors as well.

The Wisconsin income tax law was adopted in 1911 and has been in operation ever since. It is worth while inquiring what has happened in the meantime. A census of manufacture is taken at five-year intervals in the years ending in four

and nine. The interval between the two census of 1909 and 1919 is roughly coincident with the life of our income tax law, and comparison of the reports covering this period should throw some light on the question.

The census bureau selects five different tests to measure the progress of manufacturing: (1) the number of persons engaged in that line of business, (2) the number of wage-earners employed, (3) the amount of capital invested, (4) the value of the manufactured products, and (5) the value added by the manufacturing process. The aggregate pay-roll for the beginning and end of the period, the cost of material used, together with the rank held by each state according to these tests, are also presented. The following table, No. II, taken from that source, should be more convincing than the unsupported statements of partisan witnesses.

ranks ninth in the amount of primary horse-power and in the cost of material manufactured, and it ranks tenth in the number of persons engaged in manufacture, the number of wage-earners, the amount paid for services, and the value of the manufactured product—certainly not an unfavorable showing for industrial development.

In addition to the foregoing, the federal census shows that the population of the state increased from 2,333,860 in 1910 to 2,632,067 in 1920, or 12.8%. The average increase for the whole country during the same period was 14.9%, but the greatest increase occurred in the states having a large urban population. In the meantime the cities of Wisconsin containing over 10,000 population increased from 752,948 to 924,455, or 22.8%. Notwithstanding its first place as a dairy state and its great agricultural production, for the first time

TABLE II

Manufacturing Industries—Wisconsin

	1919	*1909*	*Per cent of Increase 1909-1919*
Number of establishments	10,393	9,721	6.9
Persons engaged	317,899	213,426	48.9
Primary horsepower	878,682	554,179	58.5
Capital	$1,361,729,196	$605,657,324	124.8
Salaries and wages	377,978,303	119,641,684	215.9
Value of products	1,846,984,307	590,305,538	212.8
Value added by manufacture *	719,709,346	243,948,955	195.0

* Value of products less cost of materials.

Compiled from Table I, Federal Census Bulletin—Manufacturers, 1919.

An examination of this table, with other portions of the census reports, discloses that the number of manufacturing establishments in Wisconsin increased from 9,721 in 1909 to 10,393 in 1919. The number of persons engaged in manufacturing increased from 213,426 to 317,899 in the same period. The value of manufactured products increased from $590,305,538 to $1,846,984,307. The value added by manufacturing increased from $243,948,955 to $719,709,346, and the number of horse-power employed from 554,179 to 878,682. While Wisconsin is and has been for several years past the thirteenth state of the union in population and the twenty-second in area, it ranks eighth among the states in the number of manufacturing plants, the number of salaried employes, and the amount of capital invested in the manufacturing business. It in its history the value of the manufactured products of the state greatly exceeded the value of its agricultural products.

About a year ago Mr. Witte, at that time secretary of the industrial commission and now chief of the legislative reference bureau, compiled a list of the twenty-five principal manufacturing states of the union showing the percentage of increases in the number of persons engaged in manufacture, the average number of wage-earners, the amount of capital invested, the value of manufactured products, and the value added by manufacture, for the five-year period from 1914 to 1919, together with the average percentage of increase for each state and for the entire group during the period. This analysis is shown in Table No. III.

TABLE III

PER CENT INCREASE IN MANUFACTURES IN THE UNITED STATES AND IN LEADING MANUFACTURING STATES, 1914-1919

State	*No. Persons Engaged in Manufacturing*	*Aver. No. of Wage-Earners*	*Capital*	*Value of Manufactured Products*	*Value Added by Manufacture*
United States	30.9	29.3	96.5	157.5	153.6
New York	18.3	16.1	79.9	132.5	129.9
Pennsylvania	24.9	22.9	97.7	158.3	171.7
Illinois	30.2	28.9	73.2	141.4	113.5
Ohio	45.6	43.2	125.4	186.1	187.2
Massachusetts	20.1	17.7	89.8	144.4	146.6
New Jersey	40.0	36.2	109.6	161.4	168.6
Michigan	71.3	73.9	169.3	219.1	213.5
California	68.2	74.8	81.1	177.9	187.4
Indiana	41.5	40.5	99.7	159.8	135.8
Wisconsin	38.1	35.8	81.9	165.4	159.1
Missouri	30.5	28.7	69.9	150.5	116.5
Connecticut	32.9	29.4	116.3	155.2	174.9
Minnesota	27.7	24.5	94.8	146.9	114.1
Texas	43.7	43.6	106.6	176.8	176.3
North Carolina	15.9	15.2	163.6	226.1	249.0
Kansas	48.0	47.9	118.3	182.7	163.4
Maryland	26.3	25.8	111.3	158.7	133.9
Washington	91.8	97.1	106.8	230.1	237.0
Rhode Island	25.7	23.1	92.7	167.6	182.9
Iowa	27.6	27.7	73.0	139.9	113.9
Georgia	19.0	18.2	73.7	173.7	171.9
Louisiana	27.8	26.5	76.7	164.8	151.2
Virginia	17.9	16.1	77.3	143.7	149.4
Nebraska	45.8	45.3	102.7	169.0	142.6
Tennessee	28.0	28.0	94.0	162.3	138.5

It will be observed that the percentage of increase in the number of persons engaged in manufacture was 38.1% during this period for Wisconsin as against an average of 30.9% for all the other states, an increase of 35.8% in the number of wage-earners employed as against an average of 29.3%, an increase of 81.9% in the amount of capital invested for Wisconsin as against an average of 96.5%, an increase of 165.4% in the value of manufactured products for Wisconsin as against an average of 157.5%, and an increase of 159% in the value added by manufacture for Wisconsin as against an average of 153.5% for all the other states. According to four of the five tests, the industrial progress of Wisconsin was greater than that of the average of the twenty-five manufacturing states, and greater than any of the southern states, greater than any of the eastern states except New Jersey, greater than any of the surrounding states except Michigan, and greater than four-fifths of all the states of the Union.

This progress is more remarkable because it occurred in the face of a heavy decline in several important industries, such as lumbering and logging, carriages and sleighs, brewing and malting, and leather and tanning. The one test in which Wisconsin fell below the average was in the amount of capital invested, and the census bureau specifically declares that this is the least reliable of all the tests used because of the radical changes in the price level. In the meantime, the number of establishments producing an output of more than one million dollars has increased from 86 in 1909 to 316 in 1919, and the number of horse-power from 554,179 to 878,682. In the city of Milwaukee alone the number of wage-earners increased from 59,502 in 1909 to 84,272 in 1919. The number of wage-earners in Racine increased from 8,381 in 1909 to 15,812 in 1919, and the value of manufactured products from $24,673,000 to $120,027,000 in the same period. The manufactured products in Beloit increased in value from $5,886,000 in 1909 to $21,105,000 in 1919, and the value in Kenosha from $23,182,000 in 1909 to $103,726,000 in 1919.

Marked progress was made in all the lake shore cities such as Sheboygan, Manitowoc, Green Bay, Ashland and Superior,

and in less degree in the interior cities of the state. Of course, the progress was not uniform and a few cities showed only moderate increases, but that is equally true of all other states of the union. Wisconsin is fortunately situated for manufacturing and should be expected to advance in that line. Undoubtedly its development was greatly stimulated by war conditions but that is equally true of all other states. The increase in the value of manufactured products is in large part accounted for by the increased prices resulting from war conditions, but this circumstance also applies to the other states. The great increase in the number of persons employed in manufacture, in the number of horsepower used, and in the gross volume of business transacted, is highly significant and spells a generous measure of industrial progress.

DRIVING BUSINESS OUT OF THE STATE

A word about the only two specific cases of actual or threatened removal of industries from the state which have come to our attention. The Johns-Manville Company of Milwaukee is often referred to as such a case; but the tax commission has no authoritative statement from the owners or managers of this concern or from any other reliable source to sustain the claim. The company was organized under the laws of New York, had extensive plants outside the state, and never derived more than one-fifth of its income from Wisconsin. It has not in fact removed from the state but still operates its Milwaukee plant and still derives and is taxed upon a substantial part of its income here. Its Milwaukee plant was located in cramped quarters in the Menomonee River valley, with inadequate transportation facilities both by rail and water, and we are credibly informed that this is the reason for changing its headquarters and enlarging its business outside the state. It made large profits during the war years and substantial taxes were assessed against it, but a part of these taxes were paid by personal property offsets which did not cost the company a dollar in cash. An examination of the tax rolls discloses that during the ten-year period since the income tax law was adopted it made an aggregate net profit of $2,550,433 from its Wisconsin business and that it paid only $166,475 of income taxes, leaving a net balance of nearly $2,400,000 of clear profit to its credit—not a bad showing for a persecuted industry. Of course, it also had real estate and personal property taxes but these are burdens common to all industries wherever situated, and as the income tax is the only one complained of, this statement is confined to that subject.

The only other specific case of threatened removal of an industry is that of the Simmons Company of Kenosha, which recently announced its intention to remove its executive office to New York. It is significant that no reference was made to taxes as the reason for the proposed removal in this announcement. The reason was the hostile temper of the legislature and other proposed legislation. There was no suggestion of removing the industry itself from the state, and since the announcement was made in the Kenosha papers have carried bold headlines announcing a large extension of the Wisconsin plant at a cost of more than a million dollars. Of course, the profits from the Wisconsin industry would still be taxable under our law substantially the same as heretofore except as to the salaries of the officers and employes connected with the executive department. Curiously, it is proposed to remove this branch of the business to a state which already has an income tax of substantially the same weight as that of Wisconsin and which the legislature of that state is now proposing to increase. The company always had large interests outside the state and the removal of its executive office is neither surprising nor uncommon. In the light of these facts it is inconceivable that the tax stiuation was a material factor in determining the change.

Some criticism has been made of the foregoing report since it was submitted to the legislature on the ground that it does not discuss the effect of the proposed increase in income tax rates and other matters affecting industry involved in pending legislation. The obvious answer to this criticism is (1) that the resolution, in response to which the report was made, did not call for such comparison, and (2) that if it did, it would be impossible to furnish it. The report is based upon the latest available information bearing upon the questions asked by the legislature and

is necessarily confined to existing conditions and does not purport to deal with the effect of proposed legislation or anything else that may occur in the future. It is difficult enough to find reliable information in the past without embarking on the dangerous field of prophecy or speculation. The tax commission was not asked to do so and must have refused if the request had been made.

Our conclusions based upon a survey of the whole field are: (1) there is no evidence that up to the present time either tax systems or tax burdens have had any material bearing on the location of industry in or its removal from any state; (2) that while taxes in Wisconsin are heavy and have rapidly increased, they are no heavier or more burdensome than in the average northern state; (3) that the industrial development of Wisconsin since the income tax law was adopted has been greater and its progress more rapid than that of the 25 industrial states of the Union and quite above the average of all the states; (4) that we fail to discover any evidence that either the Wisconsin tax system or its legislative policy up to the present time has operated to retard or discourage such development.

RECENT REPORTS OF TAX COMMISSIONS

Minnesota. The Eighth Biennial Report of the Minnesota Tax Commission covers the work of the years 1921-1922. This report is uniform in style with its predecessors. Taken as a whole, this series of reports sets an admirable standard for other commissions to follow, particlarly with respect to the manner in which the work of the commission and the problems confronting the people of the state are discussed. The present report contains, for local use primarily, a reprint of the Association's Committee on a model tax system, a chapter on the bank tax situation as it stood at the time the report was written, and a discussion of the theory and practice of tax rate limitations. The chapter on the bank tax problem is broadened to cover the whole problem of the proper taxation of intangibles, with particular reference to the bearing of the bank tax controversy on the Minnesota system. The report contains the usual statistical materials, and a chapter in continuation of the study of the growth of tax burden, a study which is as interesting and valuable a contribution to the subject as is to be found in any of the state tax commission reports.

Massachusetts. The report of the Tax Commissioner of Massachusetts for the year ending November 30, 1922, follows the general plan of the previous reports of this department, the plan of organization being an arrangement of the material according to the several divisions of the tax administration. The discussion is confined to the routine work of the department for the year, and the statistical material is in general similar to that which has been presented in earlier reports. Casual reference is made to recommendations already presented to the General Assembly, but these proposals are not summarized in the report.

Rhode Island. The Ninth Biennial Report of the Board of Tax Commissioners is dated February 1, 1923, and covers the period 1921-1922. In addition to the usual statistical material, the report contains a useful summary of some of the more important revenue measures now in effect, with concrete criticisms of such defects as have developed, and suggestions for improvement. A ten-year comparison of the local assessment situation enables the Board to appraise the substantial results that have been achieved since the enactment of the basic Tax Act of 1912. An interesting graphic presentation of state receipts and expenditures reveals at a glance the distribution of the state's income for 1922 according to sources and the expenditures for that year according to the principal divisions of state administrative activity. The Board remarks, with justifiable pride, that the large demands for both state and local revenues have been met without serious difficulty, and with very slight disturbance to economic conditions; but the warning is added that the tax burden has now reached

a point which compels the most careful consideration of equity in the distribution of this burden, and that the limit of productivity of the existing tax system has probably been reached. Any substantial increase in expenditures over the level of the current biennium should therefore be met from new sources of revenue.

Louisiana. The Sixth Annual Report of the Louisiana Tax Commission is for the year 1922. The report contains a brief discussion of the effects of the changes in the Louisiana tax system which were introduced by the new constitution of 1921, a reprint of some of the more important taxation laws now in effect and statistical appendices. The assessment roll for the current year shows a decline which is partly attributable to the extension of the list of exempted property by the new constitution.

Missouri. The Third Biennial Report of the Missouri Tax Commission is for the years 1921-1922. This report contains, in addition to the usual statistical material, some discussion of the routine work of the commission, and brief summaries of certain legislative recommendations. The commission requests that it be given administrative control over the state income tax, the inheritance tax and the assessment of public service corporations. It is difficult to believe that there is a state in which such a request must be made, in the light of the experience of the last few years with effective centralized administration of such taxes.

Kentucky. The Fifth Annual Report of the Kentucky Tax Commission, for the year 1922, is almost wholly statistical in character.

Connecticut. The Tax Commissioner has issued a Quadrennial Report of Indebtedness and Expenditure of Counties, Towns, Cities, Boroughs and Fire Districts, as of fiscal year ended next prior to October 11, 1920. The report is similar to the previous publications of the department on this subject. The difficulties of securing accurate information as to local finances leads Commissioner Blodgett to make some interesting observations on local accounting and financial methods. His unprinted remarks were doubtless even more interesting, not to say spicy. Connecticut should take a leaf from Wisconsin's experience, and introduce a system of uniform local accounting as the indispensable preliminary to economy in local administration as well as to accuracy in the reports.

INCOME TAX AUDIT

The income tax unit of the Treasury Department conducted a strenuous drive during the past winter on the unaudited income tax returns for the year 1917, in the effort to dispose finally of these returns before the statute of limitations definitely removed them from the world of the living. The situation that has existed with regard to the auditing of federal income tax returns has long been familiar to those who have followed the details of the federal income tax administration, although the actual condition of affairs was doubtless worse than many students of the subject had realized. A survey, in popular style, of the work of the income tax unit in cleaning up the 1917 returns, has been contributed to the New York *Evening Post* by Harold Phelps Stokes. The following summary of the problem and of the results achieved is based on Mr. Stokes' articles.

The problem confronting the income tax unit was that of disposing finally of the tax returns for 1917. The federal government made the mistake, as we see it, of failing to provide in the earlier income tax laws for some means of final and complete settlement of a taxpayer's account with the Treasury, and the result of this failure has been that returns apparently disposed of would not stay "put". New developments have arisen from time to time which have tended to keep many cases alive. These new developments have been mainly in the nature of claims, of which Mr. Stokes distinguishes three kinds—first, an arbitrary additional assessment, which led to the taxpayer's claim for abatement;

second, the taxpayer's claim for refund on the ground that the original assessment had been excessive; and third, a credit claim, which would arise when the amount due the taxpayer was offset by some other caim due the government. Despite the Herculean efforts of an administrative force that was woefully undermanned for its job, the number of 1917 returns steadily increased. In 1921 the Commissioner had reported the 1917 returns to be 94.5% complete, but in 1922 they were only 90% complete. When the drive to clean up the pending cases was started in November, 1922, there were some 50,000 unsettled cases. "And what happened?" queries Mr. Stokes. Let him answer in his own words:

"Just what has been happening right along from the beginning. Those returns turned out to be like hydras, or Cerberuses. Every time you chopped one of their heads off several new heads appeared. No sooner had Mr. Blair downed one return than a couple more turned up from somewhere, mostly from the field. Somehow or other the 50,000 were found to be 79,000. Somehow or other the 79,000 grew to be 156,000. And somehow or other, after the unit had disposed of 142,000 out of that 156,000 there were 32,000 left."

The trouble is, as Mr. Stokes says, that under the administrative methods which the federal government has employed from the beginning in dealing with the income tax, an income tax return has as many lives as a cat. "An employee of the bureau kills one as an audit, and it bobs up as a claim. He knocks it down as a claim and it rolls back at him, much after the fashion of a weighted mandarin, from the Committee on Appeals and Review. The blamed things don't know when they are dead, particularly the big fellows. You take a great big sockdolager of a "consolidated" return involving a tax, say, of $5,000,000, all bristling with legal technicalities like a porcupine, and a dozen corporation lawyers pricking it on, and you will find, if you are Commissioner Blair or one of his deputies, that it takes considerable killing before it will stay dead."

The handicap under which the government labors on account of the administrative procedure which has been set up has been further increased by the difficulty experienced in holding trained men against the lucrative opportunities which open up to the government employees after they have learned enough about the work to be really efficient. The unit may be compared to a training school, in which the employees are the students, and from which they are graduated into the employ of large taxpayers as soon as they have completed their course of training. These changes, or promotions, cannot be entirely prevented, but they could be diminished by a better scale of salaries in the unit. The government service will always suffer in this respect, and the tax administration is no exception to the general rule.

The situation has its sinister aspect, however, in the fact that an employee who has learned something about the inside details of a large corporation's affairs has something which may enable him to approach this particular taxpayer and bargain for an unusual retainer. It will probably not be possible entirely to check this practice, but some control can be exercised over it by disbarring former employees who are representing taxpayers on a contingent fee basis, and by regulating the methods by which the so-called "tax experts" secure inside information regarding the tax returns of certain taxpayers.

The degree of administrative congestion which was attained in the case of the 1917 returns may not again be equalled, but there is always a possibility that it may be approached, while the existing procedure continues. Several states are using fairly complicated income taxes and are cleaning up, each year, the returns for that year, except for the small percentage of cases which involve litigation or which, for other reasons, require unusual delay. The administrative procedure of the federal government should be reorganized in order to permit of prompt and final settlement of federal returns in the same way, without the possibility that a departmental ruling, issued long after the return was made, shall compel indefinite re-auditing, and inject administrative chaos into the operation of the tax.

INTERNATIONAL COMITY IN TAXATION

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The problem of international double taxation is one of the most serious questions that engages the attention of economists and financial experts at the present time. This problem has assumed great importance recently, especially since the war, due in the first instance to the fact that in every country taxation has been vastly increased, and in the second place to the fact that the business interests of individuals and companies in various countries have to an increased extent become international in character. The question of double taxation arises upon every occasion that two taxing authorities make a simultaneous claim upon the same taxpayer or the same source of income. Professor Seligman defines double taxation in the simplest sense as "the taxation of the same person or the same thing twice over."[1] It occurs within one and the same country where taxes are imposed independently on the same income by the central authorities and by the local authorities; it is to be found within a federation of states or between a mother country and her dominions and colonies; it occurs, finally, in cases where an individual finds the same portion of his income subject to the fiscal legislation of states politically independent of one another.

If all countries had the same conception of fiscal sovereignty, there would be little conflict of fiscal laws or superimposition of taxation. The truth is that there are a number of different principles underlying the fiscal rights claimed by the various countries which must be taken into account. At least five different principles can be distinguished:

1. Certain countries remain faithful to the system of political allegiance. They tax only their own citizens, but they tax them wherever they may be, even though they have finally left the country and all their personal effects are situated abroad.

2. Other countries maintain the principle of sovereignty over every individual who is resident, even temporarily, within their borders, and seek to impose taxation even upon aliens who are making little more than a flying visit to the country. As a rule, however, this involves simply the taxation of citizens and aliens who establish themselves definitely in the country.

3. Some countries, in applying their fiscal jurisdiction, take into account the situation of the property that produces the income — a principle which involves the exemption of all residents who have their fortune elsewhere.

4. A more modern principle is finding favor among present-day experts in financial questions, which may be called that of economic allegiance, according to which an individual's liability to taxation by the various countries is proportional to the distribution of his interests among them.

5. Finally, some combination of two or more of the foregoing principles may be used. Such a combination, for example, is found in the use of the principle of economic allegiance, modified to some extent by the principle of political allegiance.

If every country applied one or the other of the above principles to the exclusion of every other principle, the problem of double taxation would not often exist. However, a country with great natural resources, such as Australia, is likely to favor the principle of taxation of income where it arises; a country which is a financial center, such as Great Britain, will not relinquish taxation on the ground of residence. Taxation on the basis of income arising there is so important to Australia, and taxation on the basis of residence is so important to England, that the problem of double taxation will not be solved fairly because the amount of revenue to be given up by England would be very large, and

[1] E. R. A. Seligman, *Essays in Taxation* (9th ed.; New York: Macmillan, 1921), p. 98.

conformity to a mere abstract conception would be too dearly purchased. Professor Bastable states the difficulty of conformity to a rigid rule in a few words: [2]

"Taxation of Colonial property when held by residents in the United Kingdom would not be counterbalanced by similar taxation of British property owned by residents in Australia. It becomes necessary to obtain fairness as well as nominal equality, and this can only be reached by international agreement."

International double taxation may arise in connection with taxes on personal property, taxes on consumption, inheritance taxation, and income taxation. The problem is solved without much difficulty in relation to the taxes on personal property and on consumption, but there is no easy solution in relation to inheritance taxation, and especially in connection with modern income taxation. This discussion is, therefore, chiefly concerned with the hardships of double taxation as it arises in connection with modern income taxation. While, in practice, several varieties of particular cases of double income taxation are possible, they usually arise internationally from the use by two or more countries of one or more of the following combinations of bases for taxation:

1. Income of resident citizens earned abroad.
   Income of non-resident aliens earned within the country.
2. Income of non-resident citizens earned abroad.
   Income of resident aliens earned within the country.
3. Income of non-resident citizens earned within the country.
   Income of resident aliens earned abroad.

The present extension of income taxation and the recent enormous increase in the rates of the income tax in all countries have brought these particular problems to the attention of the public. No public sense of hardship arose until a great number of countries adopted direct taxes on income. Before the world war most countries raised the great part of their revenues by fiscal devices other than income taxation. In recent years the sense of grievance has become accentuated because nearly every nation using income taxation has attempted, in the interest of her own nationals, to apply the law to income arising under several of the six conditions cited above.

The scope of this paper will not permit an extended examination of particular cases of international double taxation. As a result of a questionnaire sent out in the latter part of 1921, the State Department has a very considerable amount of detailed information on this aspect of the question of double taxation in twelve of the principal countries of the world.[3] Most of this material, however, has not yet been worked into usable form. The application of the income tax laws of Belgium, France, Italy, Great Britain, and Sweden has been very ably treated in a report by the International Chamber of Commerce.[4] It will suffice to call the attention of the reader to just two typical cases of international double taxation which are of special interest to Americans.

The first case arises out of the application of the Federal Revenue Act of the United States to Canadians. There are two special phases of double taxation connected with the application of our Federal Revenue Act in so far as Canadians are concerned. The first situation will only be stated, the second discussed very briefly. In the first place, the American income tax has brought a protest from Canada on the ground that it meant double taxation of income earned in Canada by Americans. The income tax law, so the Canadians contend, is an attempt by Americans to impose income and business taxes upon companies operating in Canada and incorporated under Canadian laws, the stock of which is held in the United States.[5] Secondly, it has also been objected that Canadians living in Canada and working in the United States must pay the American normal tax rate of eight per cent, regardless of the size of their incomes. If relief could not be obtained from the last-named situation, Mr. Germain, a Canadian Member of Parliament, said that he would

[2] C. F. Bastable, *Public Finance* (3d ed.; London: Macmillan, 1903), p. 334.

[3] Consular Service of the Department of State, Washington, D. C., 1921.

[4] International Chamber of Commerce, Paris, "Double Taxation," *Brochure No. 11*, 1921, pp. 57.

[5] *Journal of Commerce*, January 28, 1910.

advocate the enactment of a retaliatory measure compelling Americans non-resident in Canada to pay a tax on the same scale on income earned in Canada.[6] At the last session of the Canadian Parliament a measure authorizing retaliatory legislation was actually passed.[7] The relief asked affects only a comparatively small part of the Canadian population and is extremely local in its nature. Persons residing at Windsor, Bridgeport, Fort Erie, Sarnia, and a few other places close to the American boundary are obliged to pay the United States income tax because they work in the United States. Premier Mackenzie King of Canada informed Washington that Canada does not desire to enforce retaliatory legislation of any kind, feeling that it is not one of the things which make for international harmony. The subject is now under consideration by the American government.

The second case arises in connection with British taxation of non-residents and agencies. If, for example, an American manufacturer of automobile tires shipped a stock of tires to England and the purchase price was paid to the distributor, a tax would be assessable against the distributor in the name of the tire company. The general rule as to taxation in a case like this is that the tax is assessable upon business done within the United Kingdom. Generally speaking, there is no provision for remission of taxes where the same source of income is taxed both by the United Kingdom and the United States. The reason advanced on this point by the British inspectors of non-residents' taxes is that the British government is concerned only with the profits made on business done within the United Kingdom.[8]

Solutions for the problem of international double taxation fall under two general heads: (1) Much of the difficulty of double taxation could be avoided if the different nations would follow one principle of taxation. Nations in framing their tax legislation, as one writer puts it, "should be guided by the idea that in matters of taxation economic allegiance should take procedure over political allegiance."[9] It is not assumed here that mere uniformity is a safeguard against double taxation, because both uniformity and double taxation can exist simultaneously. It is to be understood that nations should adopt uniform laws on taxation such as would avoid taxing the same income twice. (2) Nations could have laws which ordinarily would lead to double taxation, but could settle the cases of hardship arising from double taxation by international negotiations and agreements in such a way that the faculty of the individual would be taxed to the full but not be taxed twice over. The first suggestion would undoubtedly solve some of the present difficulties. It is unlikely that such uniformity can be attained for many years to come. Reasons, political and economic, make the expectation of such a condition utopian. It is an extremely difficult task to secure uniformity within the United States among the states, not to speak of the question of international uniformity in taxation laws. In spite of our general trend at present toward conditions of standardization, the absence of uniformity in our state tax laws is notorious.[10] And what is more, the central government has not the authority to compel uniformity.[11] To hope and work for international uniformity in tax laws where such is desirable seems to be the best that can be accomplished now. For the flagrant and outstanding cases of hardship arising from international double taxation, the remedy is international comity.

The interest of financial experts and governments in the subject of international comity in taxation is of long standing. As early as 1861, in consequence of the imposition of an income tax in India, petitions were presented to the House of Commons protesting against the double taxation suffered by residents in the United Kingdom who were liable to taxation both in England and India. These petitions were referred to the Select Committee on Income Taxation. The remedy asked was "to

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[6] *Monetary Times,* Toronto, July 21, 1921, p. 4.

[7] *Ibid.*, p. 5.

[8] *Commerce Reports* (U. S. Department of Commerce, July 31, 1922), p. 333.

[9] C. Lecarpentier, *The Problem of Duplicate Taxation Examined from an International Point of View* (Paris, 1921), p. 2.

[10] See *Report of the Committee on Inter-State Compacts* to National Conference of Commissioners on Uniform State Laws, Cincinnati, August, 1921.

[11] *Kidd v. Alabama,* 188 U. S. 730.

exempt from payment of the tax in Great Britain or in India all incomes and profits which were already subjected to the tax in the other country." [12] The general opinion of the committee was that the British income tax ought not to be altered because another country chose to adopt the same system of taxation. Sir Stafford Northcote, a member of the committee, protested against the addition to their labors which would result from a measure requiring consideration of the whole question of Indian finance. The motions were withdrawn. No further protests on double income taxation were made for another thirty years.

In 1894 Gustav Cohn, following the ideas of Adolph Wagner in this particular case, set forth five conditions that would give rise to conflicts of tax jurisdictions and cause double taxation: [13]

1. "Subjects of the country living at home may draw an income from abroad.
2. "Subjects may live abroad and draw their income from foreign sources.
3. "Subjects may live abroad while they draw their income from home.
4. "Aliens may live within the country, whether for purposes of business or for any other reason.
5. "Foreigners living abroad may draw an income from sources within the country."

Dr. Cohn suggests uniformtiy and reciprocity as a solution of these difficulties.

In 1900, Austria and Prussia held a convention on the subject of double taxation.[14] This convention was a step toward a more comprehensive scheme of dealing with the question of international taxation. The Austro-Prussian convention apportioned an individual's tax liability according to the geographical distribution of his personalty or interest. It set forth a doctrine which is a combination of political allegiance and economic interest. The convention followed in its main outlines the Imperial German Act of May 13, 1870, for doing away with the existence of double taxation among the several states of the empire.[15] The arrangements under the convention were to be based on the principle of fiscal reciprocity.

The subject of international comity in taxation was discussed at the National Conference on Taxation held under the auspices of the National Civic Federation in the city of Buffalo in 1901.[16] At the first conference of the National Tax Association the following resolution was passed: [17]

> "The principles of international interstate comity require that the same property should not be taxed by two jurisdictions at the same time."

The conference also stated: [18]

> "Retaliatory taxation is contrary to interstate comity and is in the nature of interstate war."

The declared object of the National Tax Association, as repeated in every issue of the *Official Bulletin*,[19] is:

> "To formulate and announce, through the deliberately expressed opinion of an annual conference, the best informed economic thought and administrative experience available for the correct guidance of public opinion, and legislation and administrative action on all questions pertaining to taxation and to interstate and international comity in taxation."

Between 1896 and 1911 the question of double taxation was often ventilated in the House of Commons through the medium of questions. Attempts were made in 1898 and 1907 to insert provisions for relief in the finance acts of those years. In dealing with the 1907 proposal, Mr. Asquith said that if a man, for reasons of his own, resided in England and enjoyed the protection of English laws, it was only fair that, in consideration of that voluntary act on his part, and the governmental protection extended to him, he should contribute

[12] Sir Basil P. Blackett, Memorandum, "Double Taxation" (Finance Section, League of Nations, Geneva, January, 1921), p. 7.

[13] Gustav Cohn, *The Science of Finance.* Translated by T. B. Veblen (University of Chicago Press, 1895), pp. 339-42.

[14] *Jour. of Pol. Econ.,* March, 1902, p. 255.

[15] *Finanz Archiv,* XXIII, 285.

[16] *State and Local Taxation* (National Tax Association, New York, 1907), p. 39.

[17] *Ibid.,* p. 18.

[18] *Ibid.,* p. 663.

[19] *Bulletin of National Tax Association* (New York), VI, 292.

income tax on the whole of his income, wheresoever that income arose. A change in the attitude of the British government became noticeable in 1911, when at that time the subject was discussed at the Imperial Conference and a resolution to abolish double income tax within the empire was moved by the colonial premiers. Legislative attempts to alleviate the hardship of double taxation were made in 1916, 1917 and 1918. During the debates on the Finance Bill in 1917, Mr. Bonar Law agreed that double income taxation ought not to continue after the end of the war. He said that it was impossible to give up more revenue during the war, and that the representatives of the dominions completely concurred in this view. He concluded by saying: [20]

"If I should happen to be in a position to enable me to have any influence at that time (i. e., after the war) I shall certainly see that this is one of the earliest questions considered." [21]

A number of proposals have been offered recently looking toward a practical solution of the problem of international double taxation. The *Report of the Royal Commission on Income Tax,* in 1920, after considering the problem of double income taxation within the British Empire, recommended the following principles, which were embodied in Section 27 of the Finance Act of 1920: [22]

"Firstly, that in respect of income taxed both in the United Kingdom and in a Dominion, in substitution for the existing partial reliefs there should be deducted from the appropriate rate of the United Kingdom Income Tax (including Super-tax) the whole of the rate of the Dominion Income Tax charged in respect of the same income, subject to the limitation that in no case should the maximum rate of relief given by the United Kingdom exceed one-half of the rate of the United Kingdom Income Tax (including Super-tax) to which the individual taxpayer might be liable; and

"Secondly, that any further relief necessary in order to confer on the taxpayer relief amounting in all to the lower of the two taxes (United Kingdom and Dominion), should be given by the Dominion concerned."

The British Income Tax Commission of 1920, while offering concrete methods of solving double taxation within the empire, found the consideration of the problem between the United Kingdom and a foreign state a difficult and quite different matter. The Commission held that certain factors stood in the way of eliminating double taxation between Great Britain and foreign countries, which were not in existence between England and the dominions. The Commission pointed out the following difficulties: [23]

1. Within the conception of the British Empire there was the sharing of common burdens. This was absent between England and a foreign nation.

2. The common interest of the well-being of every part of the empire was in mind in the alleviation of double taxation within the empire. This feeling was lacking between England and a foreign country.

3. The desire for free circulation of capital within the empire made the removal of double taxation an urgent necessity. This, of course, did not apply between Great Britain and other nations.

4. The merely mechanical difficulties inherent in any attempt to avoid double taxation between Great Britain and any foreign nation were apparent. This difficulty was due to the different systems, the relationship of income taxation to other fiscal methods, and the different bases on which income taxation is levied in the various countries.

The Commission made the following recommendations on the double income tax between England and foreign countries: [24]

"We are of the opinion that no satisfactory change from present conditions could be made unless reciprocal arrangements were effected between the government of the United Kingdom and the gov-

[20] Sir Basil Blackett, Memorandum, "Double Taxation" (Finance Section, League of Nations, Geneva, January, 1921), p. 9.

[21] Since the recent political events in Great Britain have placed Bonar Law in power, it will be of interest to follow his actions along these lines.

[22] *Report of Royal Commission on Income Tax* (London, 1920), sec. vi, par. 70.

[23] *Ibid.*, sec. vii, par. 79.

[24] *Ibid.*, par. 83.

ernment of each foreign state where an income tax is in force; and that it would only be practicable to arrive at such arrangements by means of a series of conferences, possibly under the auspices of the League of Nations, such as we have been happy to hold with the representatives of the governments of the Dominions. These considerations, among others, have led us to the conclusion that in the present circumstances we cannot recommend any change in the existing situation as to double taxation of the same income by the United Kingdom and the Government of a foreign State."

Our Federal Revenue Act of 1921 contains provisions which deal, to a certain extent, with the removal of double taxation. These principles are introduced by Section 222, Part (a) of the Act: [25]

"That the tax computed under part II of this title shall be credited with:

1. "In the case of a citizen of the United States, the amount of any income, war-profits and excess-profits taxes paid during the taxable year to any foreign country or to any possession of the United States; and

2. "In the case of a resident of the United States, the amount of any such taxes paid during the taxable year to any possession of the United States; and

3. "In the case of an alien resident of the United States, the amount of any such taxes paid during the taxable year to any foreign country, if the foreign country of which such alien resident is a citizen or subject, in imposing such taxes, allows a similar credit to citizens of the United States residing in such country; and

4. "In the case of any such individual who is a member of a partnership or a beneficiary of an estate or trust, his proportionate share of such taxes of partnership or the estate or trust paid during the taxable year to a foreign country or to any possession of the United States, as the case may be."

The agreement of other countries, therefore, and their acceptance of the offers would be sufficient to avoid the superimposition of any taxation whatsoever by the United States upon income of non-American origin.

One of the most practical international conventions which has, up to the present time, been negotiated is that which was concluded in Rome on June 13, 1921, between the Succession States of Austria-Hungary, and has been submitted for ratification of the various parliaments. It examines in turn the various taxes actually in force in most systems of taxation and lays down the following principles in each case: [26]

1. "Land: Taxes should be levied only for the benefit of the state in which the real property is situated.

2. "Movable capital and annuities: Taxes should be levied by the State of residence of the owner of such capital.

3. "Movable property: Taxes belong to the State in which the person entitled to the income lives.

4. "Salaries, emoluments and incomes from work: The tax should be levied by the State from which the income is derived.

5. "Commercial profits: The tax should benefit the State in which the head office of the firm is situated, even if its activities extend abroad. If, however, the firm possesses permanent branches abroad, each State will levy the tax on the income produced by the establishment situated within its borders.

6. "Super-tax on Income: The Convention stipulates that this tax will be divided according to the various categories of the taxpayer's income, and each category will be assigned according to the rules provided for it. In cases of doubt, the tax is levied by the State of residence, and if the taxpayer has residence in more than one State, it is divided between the States concerned.

7. "Succession Duties: The Convention provides that, with regard to these duties—and, generally, to all taxes upon capital—account will be taken of the different categories of capital comprising the inheritance. The principles outlined above will be applied in respect to the income derived from each category.

8. "Finally, the Rome Convention decided that if double taxation occurred, de-

[25] Revenue Act of 1921 (National Bank of Commerce, New York, 1922), p. 49.

[26] International Chamber of Commerce, Paris, "The Problem of Double Taxation," *Digest No. 25*, 1922, p. 3.

spite the foregoing rules, the taxpayer could lodge a claim with the authorities of his country, with a view to securing a satisfactory solution by diplomatic means of his particular case and even to establishing a new precedent."

During the first half of the year 1921 the question of double taxation was examined by a select committee of the International Chamber of Commerce which was specially appointed for the purpose in accordance with Resolution Number 2, adopted at the organization meeting in Paris in June, 1920. This committee, after inquiry into the legislative practice of the affiliated countries in the Chamber, laid down a number of principles which were embodied in Resolution Number 1 of the London Congress, 1921.[27] The Committee of the International Chamber of Commerce collected precise and detailed information regarding double taxation, and made this statement as the result of its investigation: [28]

After having carefully studied the different special laws on this question and the general principles upon which these laws are based, we have unanimously arrived at the conclusion that the granting of a complete rebate is difficult, if not impossible, but that an attempt should be made to arrive at the establishment of a transactional system based on an additional and moderate form of taxation and on *general reciprocity* between nations."

The League of Nations has been actively engaged upon the question of double taxation ever since the Brussels Financial Conference of 1920. The League is trying to work out principles for an international understanding so as to avoid the imposition of double taxation. At a meeting held at the end of March, 1922, the Financial Committee of the League appointed four experts to make an inquiry into the subject, namely: Professor Einaudi, of Turin University; Professor Seligman, of Columbia University; Sir Josiah Stamp, of the University of London; and Professor Bruins, of Rotterdam. The principles upon which the experts are working are suggestive of a plan of meeting the problem of double taxation. These principles are as follows: [29]

1. "What are the economic consequences of double taxation from the point of view: (a) Of the equitable distribution of burdens. (b) Of interference with economic intercourse and with the free flow of capital. To what extent these consequences are similar in the different types of cases commonly described as double taxation.

2. "Whether any general principles can be formulated as a basis for an international convention to remove the evil consequences of double taxation, or whether conventions should be made between particular countries, limite to their own immeiate requirements; and in the latter alternative, whether such particular conventions can be framed as to be capable ultimately of being embodied i na general convention.

3. "How far the principle of existing arrangements for avoiding double taxation whether between independent nations (e. g., the Rome Convention) or between the component portions of a federal state, are capable of application to new international conventions.

4. "Whether or to what extent a remedy can be found in an amendment of the taxation system of each individual country independently of any international agreement.

5. "To what extent the conventions on the subject of double taxation should establish an international control to prevent fraudulent claims."

The American Committee on Double Taxation, of the International Chamber of Commerce, made a report on the problem which contains some very interesting and suggestive remarks. The American Section reported:

"In the opinion of the American Section of the Committee on Double Taxation, actual progress in the elimination of double taxation can best be secured at the present time by endeavoring to agree upon, and after such agreement, to secure the adoption by the principal commercial nations, of a few definite proposals of a comparatively restricted scope, which have

[27] International Chamber of Commerce, Paris, "Double Taxation," *Brochure No. 11*, 1921, p. 5.

[28] *Ibid.*, p. 4.

[29] E. R. A. Seligman, Memorandum, "The League of Nations Committee on Taxation" (League of Nations, Geneva), 1922.

been found in practice or which have after careful consideration promise to reduce or eliminate important cases of double taxation. The American Committee has considered some of the questions of principle—such, for example, as the extent to which nationality or citizenship creates an obligation to support by taxation the country of citizenship; the conflicting claims of the jurisdiction in which income is earned, that in which it is received, and that in which the taxpayer resides. While the committee recognizes that various difficulties will be encountered in securing legislation of such a character in the various nations involved as to avoid undue or unfair taxation, yet on the other hand it is distinctly practicable, in the opinion of the American Committee, to discover through international discussion and conference a few specific rules of procedure which give real promise of settling in a satisfactory way particular problems of importance."

The question of double taxation also formed part of the programs of the Economic and Finance commissions of the Genoa Conference. The Economic Commission recommended that taxes "should be strictly limited to that part of the capital eiectively engaged within the country in which they are levied, and to those operations only which are undertaken in that country," and urged that "double taxation should be avoided by agreement between nations" in accordance with principles elicited by the inquiry of the League of Nations.[30]

The foregoing facts are evidence that the question of double international taxation is of great concern at the present moment. The considerations to which attention has been drawn in the course of this discussion appear to suggest that a perfect remedy for double income taxation as it exists is not likely to be found. The difficulty of eliminating international double taxation lies in the fact that there is general agreement that each state has an unrestricted right to tax within the sphere of its jurisdiction. Hence, a reasonable workable solution which removes any substantial hardship is the best that can be hoped for. To attain even this end there is an urgent need for international comity in taxation.

[30] Papers Relating to International Economic Conference, "Article 15 Economic Commission Report" (His Majesty's Stationery Office, Imperial House, Kingsway, London).

DECISIONS AND RULINGS

EDITED BY A. E. HOLCOMB

Income, Federal — Relief and Recovery—Injunctive Relief. — The supreme court reversed the lower courts in the Dupont case, thereby decisively announcing the binding effect of section 3224 Revised Statutes, in preventing the use of injunction to prevent collection of federal taxes. Some doubt had been thrown on the matter by the granting of an injunction in *Lipke* v. *Lederer,* 259 U. S. 557; *Bul.* VIII, 28; *Regal Drug Co.* v. *Wardell,* Dec. 11, 1922; *Bul.* VIII, 114, and *Hill* v. *Wallace,* 259 U. S. 44; *Bul.* VII, 294. These decisions were explained as in reality involving the collection of penalties and as not disturbing the general rule long established that attacks upon the validity of federal taxes may only be heard and considered after the tax has been paid and in a suit to recover it back.

In this case a taxpayer filed his return for 1915 in March, 1916. He did not include therein as income certain shares he had received as a stockholder in a corporation, upon a reorganization and the formation and distribution of shares of a new corporation. The transaction in question was considered in the case of another stockholder, and was held to have effected a realization to the stockholders of the old corporation of income, through the segregation of past accumulated profits from the capital of the old corporation.

The treasury department, after an investigation, made an assessment against the taxpayer, amounting to $1,576,015.06. Objection was made and a hearing had and thereafter, and on March 8, 1920, the taxpayer filed a claim for the abatement of the tax as void, because made after the three-year period of limitation and because the shares in question were not income.

Thereafter the other stockholder referred to above, by agreement between stockholders similarly situated, paid the tax similarly assessed upon him and brought suit to recover. The decision of the supreme court denying the relief was rendered November 21, 1921. Thereafter this taxpayer's abatement claim was denied and this action to enjoin enforcement of collection, through distraint, was begun January 30, 1922.

The district court felt that an exception to the general rule above alluded to must arise when, as here, it appeared that at the time the taxpayer began this suit he could not have paid the tax and sued to recover, being barred by the statutory limitation of time. It accordingly issued the injunction prayed for.

The supreme court held, however, that as the taxpayer had two years after the assessment to test the legality of the tax, he could not by delaying payment until his time to sue to recover had expired make out a case so exceptional as to render section 3224 inapplicable.

The conclusion reached rendered it unnecessary for the court to consider the limitation which led the district court to find the case an exception to the general rule against injunctive relief. It observed, however, that by the amendments to section 252 of the Revenue Act of 1921 and to section 3226 Revised Statutes, by the act of March 4, 1923, the taxpayer now had the right to pay and sue to recover and to raise in such suit the question of the bar of time against the assessment in question, which he attempted to raise in this action. — *Graham* v. *Dupont,* U. S. Sup. Ct., May 21, 1923.

Income, Federal—Mining Royalties as Income — Depletion Deduction by Lessor.—Coal lands were under lease during the year 1917 on a royalty basis. The owner of the lands in its income tax return for that year charged the entire amount of the royalties received during the year to depletion. The department revised the return and applying its regulations determined that the depletion was a sum found by dividing the value of the lands on March 1, 1913, by the estimated number of tons of unmined coal on that date and multiplying the quotient by the number of tons mined during the year. Additional tax was thus found due, which was contested.

The plaintiff contended that the rules did not properly apply to an owner leasing on a royalty basis; that if they did apply, they were illegal and void, because no reasonable depletion allowance could be found thereunder, as required by the revenue act; that the actual depletion was measured by the royalties received and it was unnecessary to resort to any artificial method of valuation such as was prescribed by the regulations; that the royalties paid represented the value of the coal in the ground and contained no element of profit, and were therefore principal and not income.

The court found that the contention that no income arose from the receipt of royalties was considered and rejected in cases arising under the corporation excise tax law of 1909 and was no longer open to discussion (*Stratton's Independence* v. *Howbert,* 231 U. S. 399). It could see no substantial difference as taxable income between income derived from royalties and that derived from the sale of ore taken out by the owner. The latter separated the mineral and after deducting from the proceeds of the sale the cost of mining, had left the value of the ore in the mine; the lessor received the same thing, the expenses being paid by the lessee; in either case the net present value of the ore was subject, for taxation purposes, to a deduction of its value in the land, as of March 1, 1913. The methods applied by the regulations for arriving at this figure as the net income were held not inconsistent with the provisions of the revenue act and not arbitrary or unreasonable.—*New Creek Co.* v. *Lederer,* 287 Fed. 99.

Income, Federal — Proceeds of Insurance Policy Not Taxable Income to Corporations. — The U. S. Court of Claims has rejected a ruling of the department under which exemption was denied a corporation for income consisting of the proceeds of an insurance policy paid to it upon the life of its president. The department's ruling was based upon the fact that in the revenue act of 1918, income to be excluded included the proceeds of life insurance policies paid to *"individual beneficiaries,"* from which it was concluded

the exception did not apply to corporations. The court, however, pointed out that in the provisions of the act defining income for corporations, the term "gross income" was stated to mean the gross income as defined in the section dealing with individuals and that the fact that the proceeds of life insurance policies was specifically mentioned in that section could hardly be used to carry the implication that such proceeds must be held income, when received by corporations. It would be more logical to hold that the same exclusion applied to corporations and that it was not deemed necessary to define income for corporations where it had been declared to be the same as for individuals.

The court observed that the act of the corporation in insuring the life of its president was a reasonable act of prudence to provide against a possible loss; that Congress did not intend to tax the proceeds of life insurance policies, a conclusion which it found supported by the dropping from the section in the 1921 act, the words "individual beneficiaries."

It also expressed the opinion that the exclusion was intended because the proceeds of insurance policies were not income in the accepted meaning of that word, which had been defined as the gain which accrues from property, labor or business (*Merchants L. & T. Co.* v. *Smietanka*. 255 U. S. 509, 518; *Bul.* VI, 218). The money paid out for premiums could not be considered an investment from which the company could expect an income. Judgment for the recovery of the tax collected was ordered. — *Supplee-Biddle Hardman Co.* v. *United States,* U. S. Ct. Cl., May 7, 1923.

Income, Federal — Improvements on Leased Premises as Expenses — When Deductible—"Paid". — An interesting decision has been rendered by the federal circuit court of appeals against the validity of a departmental regulation. The question arose over several items expended by a railroad for improvements on leaseholds. The items consisted of expenses for work and materials required for repairs and renewals, improving and increasing weight of rails, yard tracks, defined generally as "additions and betterments," incurred by lessee of railroads held under 999-year leases; also for expenses in connection with leases of piers from the city of New York. All the leases provided that the additions and betterments should revert to the lessors upon the expiration or termination of the leases and the expenditures incurred were required by the terms of the leases. There was some question as to the validity of the deductions but they were definitely sustained under the clause of the 1916 revenue act providing for deduction of "all ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties, including rentals or other payments required to be made as a condition to the continued use or possession of property," the payments being held additional rentals. The real question was as to the time when the deduction should be made. The government contended for a prorate of the total sums over the life of the leases, in accordance with article 140 of Regulations 33, while the plaintiff asserted that the rentals were paid within the year 1916 and should be deducted in that year.

The court referred to the express provision of the statute that all such rentals "paid within the year" might be deducted "from the gross amount of income received within the year," in order to ascertain the net income to be taxed and found that the evident intention of the statute was that the deduction should be made "within the year" in which paid (*McCoach* v. *Minehill Ry. Co.,* 228 U. S. 295, 304); that there was no hint of prorating and that the provisions of the statute were plain. It was therefore held that that part of the regulation providing that only an aliquot part of the rentals might be deducted each year during the life of the lease was inconsistent with the plain provisions of the statute and the decree of the district court giving judgment for the full amount claimed was affirmed.—*Cent. R. R. of N. J.* v. *Duffy, Collector,* U. S. C. C. A.; 3d Circ.; May 3, 1923.

Federal Transportation Tax—Charter Party.—The federal district court has held that the federal tax on transportation of freight applies to sums paid to the owner of a vessel under a charter party, as being paid for transportation.

The court expressed the opinion that the question turned upon whether the contract was one for the lease of the vessel or for

services, and that this depended upon the degree of control over the vessel given the respective parties.

In this case, the contract provided for the use of the vessel for the transportation of coal between Hampton Roads or Baltimore and Boston, at a yearly rental of a specified amount.

The fundamental rule was found in *Leary* v. *U. S.,* 14 Wall. 607, and the court proceeded to examine various provisions of the contract from which it concluded that taking the instrument as a whole, the construction that the charter was one for use and not a demise of the ship, was the more reasonable and was better supported by authority; that the most important provisions were consistent only with an intention of the owner to retain possession and command of the vessel and that it was well settled that command and possession and consequent control over its navigation must be surrendered to the charterer before he could be regarded as the owner *pro hac vice* (*Hagar* v. *Clark,* 78 N. Y. 45; *The Nicharagus,* 71 Fed. 723; 72 Fed. 207).

The court proceeded to describe various provisions of the charter which supported its view and concluded that the charterer was given the right to the transportation of coal between the points in question and that the charter hire was paid for such transportation and was taxable under the act in question.

Another question arose from the fact that the charterer—a railroad company—had been, subsequent to the date of the charter, taken over for operation by public trustees, pursuant to an act of the legislature of Massachusetts and a portion of the charter payments were made subsequent to such taking over. Thus the question was whether such payments were exempt, as being made by the state. The court held that the taking over was not an act of proprietorship but was merely for operation in the public interest; that the actual payments were made by the railroad company and not by the state, which merely occupied a position of guardianship. The payments were therefore held not exempt.—*Boston Elevated Ry. Co.* v. *Malley,* U. S. Dist. Ct., Dist. Mass., April 27, 1923.

Valuation of Public Utility Property for Rate-making Purposes. — The long and seemingly endless controversy over the basis or method for arriving at a determination of value in testing the validity of rates fixed for service rendered by a public utility, seems to have been substantially affected, so far as the courts are concerned, by the decision of the supreme court in a telephone case.

The record showed that the action of the utility commission complained of had been based upon a valuation of the property made in 1913, 1914 and 1915. The court, after referring to its previous decisions in *Wilcox* v. *Consol. Gas Co.,* 212 U. S. 19, 41, 52, and *Minnesota Rate Cases,* 230 U. S. 352, 454, to the effect that the value taken upon which to test the rates should be that existing at the time of the investigation and not cost or some other value, made the following comment:

> "It is impossible to ascertain what will amount to a fair return upon properties devoted to public service without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values made upon a view of all the relevant circumstances, is essential. If the highly important element of present costs is wholly disregarded, such a forecast becomes impossible. Estimates for to-morrow cannot ignore prices of to-day."

Testing the net profits available for depreciation and return on the basis of the above observations, the court found that they would amount to approximately 11⅓ per cent of the minimum value of the property. Six per cent being assumed a fair depreciation rate, that rate having been accepted by the commission, left a possible return of 5⅓ per cent, which was characterized as "wholly inadequate, considering the character of the investment and interest rates then prevailing." The decree of the state court was therefore reversed.

Those who are interested in the other side of the controversy will find ample encouragement in the elaborate dissenting opinion of Justice Brandeis, concurred in by Justice Holmes, who while concurring in the judgment of reversal, did so upon the ground that the order of the commission prevented the company from earning a fair return upon the "amount prudently invested," that phase expressing their conception of the proper basis to be used in testing the reasonableness of rates and

which is discussed in an elaborate argument. — *State ex rel. Southwestern Bell Telephone Co.* v. *Public Service Commission of Missouri,* U. S. Sup. Ct., May 21, 1923.

Foreign Corporation — Franchise Taxes—Discrimination.—A foreign corporation obtained authority to do business in Oklahoma at the time it was a part of the Indian Territory, by complying with the provisions then in force, which were that foreign corporations were subject to the same regulations, limitations and liabilities as domestic corporations. Some time after its admission as a state, statutes were enacted imposing annual license taxes upon foreign corporations at a higher rate than on domestic corporations. The federal circuit court of appeals held the tax as to the company involved invalid. It said: "The question is not involved here of the right of a state to impose different burdens on a foreign corporation coming into the state, or the right to exclude such foreign corporations entirely. . . . Plaintiff was not a foreign corporation coming into the state. It was there, it had certain vested rights, and it had been there for a long period of time, between the admission of the state and prior to the passage of the act in question, doing business similar in kind to that transacted by domestic corporations. To subject this plaintiff, under the circumstances disclosed in the record, to a more onerous rule of taxation than domestic corporations for carrying on similar business, is a denial of the equal protection of the laws and violation of the Fourteenth Amendment to the Constitution." — *Leecraft* v. *Texas Co.,* 281 Fed. 918. (Petition for writ dismissed by U. S. Sup. Ct., May 21, 1923.)

Franchise Tax — No Par Value Stock. — Under the Illinois statutes an annual franchise tax is imposed upon corporations doing business in the state based upon the proportion of the amount of the authorized capital stock represented by property and business in the state. The section under which such tax is imposed contains no provision with respect to stock of no par value. Other sections of the statute imposing an initial fee and a franchise tax on corporations having no property in the state and which transact no business in the state contain provisions that no par stock shall be considered to have a par value of $100. A corporation had all its property and transacted all its business in the state, and its capital stock consisted in part of no-par-value stock. The state imposed the tax, taxing the no-par stock at $100 per share, and such tax was resisted. The court held that as the section under which the tax was imposed contained no provision authorizing no-par stock to be taken at $100 per share, the court could not read into the statute language which was not found therein; and held the tax illegal.—*People ex rel. Roberts & Schaefer Co.* v. *Emmerson,* 137 N. E. 202.

Production Taxes and the Commerce Clause—Minnesota Iron Ore Production Tax Valid.—The affirmance by the Supreme Court of the decision of the federal district court in the Minnesota iron ore tax case establishes such taxes upon a much more firm basis than has heretofore existed. The size of the corporations and the character of the legal talent involved, the unusual length of time in which the court was considering the case, with final unanimity in its decision, makes this case of far-reaching importance.

The tax was imposed by an act of the 1921 legislature and levies an "occupation" tax on the business of mining ores equal to 6 per cent of a valuation obtained by deducting from the value of the ore at the mouth of the mine the cost of mining and hoisting, the royalties paid, and a percentage of the advalorem taxes paid on the realty in which the ore is deposited. It is thus, in effect, a sort of an income tax.

The mining companies contested the validity of the tax as in conflict with the commerce and equal protection clauses of the federal Constitution and with the uniformity clause of the state constitution. The district court sustained the tax with a brief opinion, noted in *Bul.* VIII, 25.

The companies insisted that the tax was in reality an advalorem tax, but the court defined it as an occupation tax, as it was designated in the act and considered the objections from that standpoint, observing that mining was a well-recognized business which was subject to tax like manufacturing.

The chief contention was that the tax

was repugnant to the commerce clause, because only a negligible percentage of the ore mined was marketed within the state and practically all was mined to fill existing contracts with consumers outside the state, passing at once into interstate commerce by means of adjacent railroad yards and tracks. At the open pit mines the ore was loaded from the pit into cars which were run directly into the mines, so that there was practical continuity of movement from start to finish.

The court was without doubt in its rejection of the contention, holding that mining was not interstate commerce but like manufacturing, a local business, subject to local regulation and taxation; that this characteristic was intrinsic, was not affected by intended use or disposal of the product or controlled by contractual engagements and that it persisted even though the business was conducted in close connection with interstate commerce, citing among other authorities on these important points, the recent cases of *Crescent Cotton Oil Co.* v. *Mississippi* (*Bul.* VII, 92), and *Heisler* v. *Thomas Colliery Co.* (*Bul.* VIII, 117).

The discussion of this contention closes with the observations that the ore did not enter interstate commerce until after the mining was done and that the tax was imposed only on the mining; that the tax affected interstate commerce only indirectly and incidentally, just as did the taxation of railroad and telegraph lines, and that no discrimination against that commerce was involved.

The objections based upon the Fourteenth Amendment and the state constitutional provision requiring uniformity upon the same "class of subjects" were met on the familiar ground that wide discretion is given the states in classification, which had not been exceeded. The exemption of contractors who stripped off the soil; of others who loaded the cars or who raised the ore from the underground mines, was not seen to invalidate the classification, as these contractors were not miners but employees, whose pay was a part of the expenses of the principals. The non-inclusion of those who did development work, without extracting ore was also not found subject to criticism.

The claim of discrimination against owners who did not pay royalties and thus had no deduction for such payments was held an important one which involved a construction of this particular provision of the act and possibly of the state constitution and thereafter of the Fourteenth Amendment. The state court had not considered this and the record showed that all but six mines in the state were operated under leases and that none of those six were operated in any way during the year 1921, and hence that no tax was enforcible against them. On the familiar principle that only those whose rights are directly affected may question the constitutionality of a state statute and invoke the jurisdiction of the Supreme Court therein, this question was left entirely open.

The varying terms of the leases with respect to the amounts of royalty to be paid were held not to work arbitrary or unreasonable discrimination, as all lessees were allowed deductions, in accordance with the particular facts as to each. The decrees were affirmed.—*Oliver Iron Mining Co. et al.* v. *Samuel Lord et al.,* U. S. Sup. Ct., May 7, 1923.

LICENSE — TRAVELING SALESMEN—INTERSTATE COMMERCE.—A foreign corporation engaged in selling tea and coffee had a branch in Nebraska, where it made some sales at retail but its principal business in the state was done through agents, who went from place to place and solicited orders. The branch did not keep a stock of merchandise on hand, but each week the manager estimated the amount of merchandise necessary for these orders, which was shipped in large packages from the home office without the state to the branch. At the branch this merchandise was not mingled with the stock sold at retail, but the orders taken by the agents were filled therefrom. The merchandise used to fill the orders usually did not reach the state until some time after the orders were taken. One of the agents was fined for failing to pay the occupation tax imposed by a municipality upon sellers of merchandise by retail, who had no permanent place of business therein. The court held that the fine was unlawful; that the ordinance imposed a burden upon interstate commerce and was unconstitutional; that the ordinance was not intended as a revenue measure but to prohibit competition by outsiders; and that while the original packages

of the merchandise received in interstate commerce were broken and the orders filled therefrom, it would apply the law according to its true intent and to the substance of the transactions involved.—*Purchase* v. *State,* 191 N. W. 677.

License—Classification. — The Alabama court held that a statute imposing a tax upon persons engaged in buying and selling real estate on commission and an additional tax when such persons were also engaged in loaning money as an incident to the real estate business, was valid, although persons other than those engaged in real estate business but engaged in the business of loaning money were not taxed. The court found the classification to be reasonable.—*Maury* v. *State,* 93 So. 802.

License—State Tax Exclusive.—The Alabama statutes impose a state registration fee or license tax on all motor vehicles in lieu of all other privilege or license taxes, state or local. A municipality enacted an ordinance requiring all residents operating motor vehicles to obtain a driver's permit and to pay a fee of one dollar for such permit. The court held the part of the ordinance imposing the fee invalid, on the ground that the state had prohibited the imposition of further privilege or license taxes on automobiles, and that municipalities could not add a charge, under the guise of a permit, to do that which the state had fully provided for.—*City of Birmingham* v. *Bergreen,* 94 So. 195.

Local Self-government — License—State Tax on Municipality—Contract Clause. — An interesting case arose over the validity of a New Jersey law imposing a state tax for the diversion of water, as applied to municipalities operating water systems.

The state recovered judgment in the state courts against the city of Trenton for $14,310 and appeal was taken to the United States Supreme Court upon the claim of violation of the contract and due-process clauses of the Federal Constitution.

The city had acquired the right to take water from the Delaware River by purchase from a private water company, to which the right had been granted by the legislature. The city claimed that as this right was unlimited as to the amount of water to be thus taken, the act in question imposing a license fee for water taken in excess of that lawfully being taken at the date of its passage, constituted a violation of its contract right.

The court reviewed the decisions as to the power and duty of the state to control and conserve the use of its water resources for the benefit of all its inhabitants and observed that the power to determine the conditions of diversion was a legislative function, leading to the question whether, assuming the city's grantor to have received a perpetual right, unlimited as to extent of diversion and unburdened by license fee or other charge, it followed that the state as against the city was bound by contract and was without power to impose the fee provided in the act.

The discussion of this question led the court to an interesting and instructive analysis of the relations of a state to its subordinate governments and of the respective rights and duties of each. These relations were found not the same as those between the state and the grantor water company. Its rights were privately owned and therefore safeguarded by the constitutional provisions invoked by the city. The city, however, was a political subdivision of the state, subject to the superior rights and duties of the state, which exercised such rights and duties, either directly or by delegation to the subdivisions, citing the illuminating decision in *Hunter* v. *Pittsburgh,* 207 U. S. 161, 178, 179.

Being the creature of the state, a municipality may only exercise the powers and privileges of self-government subject to state control. The grant of power to a municipality is not to be considered as anything like a contract, as such a conception would be utterly incompatible with the nature of the relations between the state and the municipality. (*Mount Pleasant* v. *Beckwith,* 100 U. S. 514, 524.)

Thus the court announced that "the power of the state unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for 'governmental purposes' cannot be questioned."

This led the court to a discussion of the distinction between property owned by a municipality in its public and governmental capacity and that owned by it in its pri-

vate or proprietary capacity, this distinction forming the real crux of the case. The careful analysis of the cases is well worth study and reflection, as the distinction is narrow and its basis is, as said by the court, "difficult to state," there being "no established rule for the determination of what belongs to the one or the other class." The rule running through all the decisions was held to be that the constitutional restraints which may apply to situations arising with respect to municipalities in their private and proprietary rights, as against individuals, have no application as against a state and in favor of its own municipalities, and thus it was held that the city could not invoke the Federal Constitution against the imposition of the license fee in question. No federal question was therefore held to be presented and the writ of error was dismissed.—*City of Trenton* v. *State of New Jersey*, U. S. Sup. Ct., May 7, 1923.

Income, State — New York Corporation Income Tax—Use of Federal Law —Interest from Federal Securities.— The controversy over the interpretation of the New York corporation franchise tax law, based on net income, has recently reached the Appellate Division of the Supreme Court and a decision has been rendered favorable in the main to the state's contentions.

The law as originally passed contained no definition of net income, but required the tax to be computed upon the net income "upon which the corporation is required to pay a tax to the United States" and another section required the tax to be "based upon the entire net income of such corporation as returned to the United States treasury department for such fiscal or calendar year." This language was thought to render the law liable to attack as lacking in due process, and amendments were made in 1918 by which the net income was described as "presumably the same" as that for the federal tax and provision was made for claim by the corporation that such income was not accurate and for "correction" by the tax commission. Owing to statements in a decision that these amendments did not really change the original definition of net income, as no independent definition was set up, in 1919 further amendments were made. The words "entire net income" were substituted for the words "net income" throughout the statute and the term "entire net income" was defined to mean the "total net income, before any deductions have been made for taxes paid or to be paid to the government of the United States on either profits or net income or for any losses sustained by the corporation in other fiscal or calendar years, whether deducted by the government of the United States or not." The reference to the income as that "returned to the United States treasury department" was changed to read income "as defined" in the chapter.

In view of these amendments, the court held that it could no longer be claimed that the legislature intended that the net income in the state act had the same meaning as taxable income in the federal act; that while in a sense there was no specific definition of net income, by reference to gross income and deductions, this was not necessary to carry out the intention of the legislature, as the words "net income" had a common and usual meaning known to the commercial and business world which was not necessarily the net income taxable under the federal act. That act, for instance, allowed as a deduction dividends received from other corporations and interest from federal, state and municipal bonds, yet these were certainly a part of the income of a corporation owning such stocks and bonds.

The objections of the corporation in this case were to the inclusion of interest from tax-exempt bonds and the refusal to deduct taxes paid by it to foreign governments. The first objection was rejected because such interest was part of the income of the company, under the construction of the act as above noted. The tax is imposed upon domestic corporations for the privilege of exercising their corporate franchises and upon foreign corporations for the privilege of doing business in the state. It was therefore held to be a franchise tax and not an income tax or a direct tax on the income. Being such a tax, the state may adopt any just and fair measure; the income is the measure of the tax, not the subject of it. For the purpose of such a tax, the inclusion of interest from tax-exempt bonds is not prevented. (*Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *People ex rel. etc.* v. *Knight*, 174 N. Y. 475; *Peo.*

ex rel etc. v. *State Tax Commission,* 232 N. Y. 42.)

The court found, however, that the commission had wrongly included the entire interest from such bonds, holding that such interest should have been prorated within and without the state upon the same ratio as the other income.

The second objection was sustained, the court holding that foreign taxes should have been deducted in reaching net income as such taxes were part of its expenses which lessened its gross income. — *People ex rel. Standard Oil Co. of N. Y.* v. *State Tax Commission,* N. Y. Sup. Ct., App. Div.; 3rd Dept., May 2, 1923.

In another case, decided the same day, the same court held that in determining the net income of a domestic corporation doing business wholly in New York, such business being the purchase, holding and sale of stocks and securities, collecting the income thereupon and distributing it to its stockholders, the dividends should be included in net income. This necessarily followed from the reasoning in the above case and was decided on that opinion.— *Peo. ex rel. Nor. Finance Corp'n* v. *State Tax Commission.*

"Interstate Commerce" Defined.— The federal circuit court of appeals in a case involving the rights of a labor union in a strike, defined "interstate commerce." It said "Indeed, the established rule is that 'interstate commerce', within the meaning of that term in the Constitution and the Anti-Trust Act, embraces far more than the mere sale, exchange, and interstate transportation of the goods. It includes intercourse, it comprehends every contract, trade, and dealing between citizens of one state and those of another which contemplates the transportation of goods, persons, or information from one state into another, and every initiatory, negotiating, and intervening act of the parties to that trade or deal from the time the intercourse relating to it commences until the transportation and delivery have been completed." — *United Leather Workers' International Union* v. *Herkert & Meisel Trunk Co.,* 284 Fed. 446.

Estoppel in Omitted Assessments.— In Maine, the property of a civil war veteran, not in excess of $5000, is exempt from taxation. When the town assessors made their original tax list, the property of a veteran having a greater value than the statutory amount was not included, the assessors believing that the value was less than the exempt amount, but they added his name and a description of his property at the end of the list under the heading "property not taxed." After the assessment list was completed and the warrants issued they ascertained the facts and assessed his property as omitted property, on a supplement to the original list. The veteran resisted the assessment claiming that the action of the assessors in including his name and the description of his property in the original list precluded them from making a supplemental assessment. The court upheld the assessment on the ground that there was no statutory duty to add non-taxable property to the assessment list; that there was no assessment of the value of the property on the original list and therefore it could be made the subject of a supplemental assessment; that the rule invoked by the veteran applied only in cases where there was an undervaluation of property. — *Inhabitants of Athens* v. *Whittier,* 118 Atl. 897.

Reassessment under Validating Act. —In Indiana, after the court had held that the state board of tax commissioners had no power to order a horizontal increase in assessments in the taxing units of a county, an act was passed supplemental to the original act defining the board's powers, designed to validate the action of the board in ordering horizontal increases in certain counties. Upon the passage of this act, the board met and re-adopted its orders and certified them to the county boards. A county board met and, without notice to the taxpayers, adopted the increases ordered by the state board; thereupon the taxpayers questioned the validity of the assessments resulting from such order. The court held that as the original order of the state board was unauthorized by law, the act could do no more than confer upon the board the power to expunge from its records the illegal action and that irrespective of whether the act was valid or not. the reassessments in question were invalid, because of the failure of the county board to give notice to the taxpayers of its inten-

tion to make them. — *Bosson* v. *Lemcke*, 137 N. E. 551.

Assessment — Appraisers Assisting Assessors.—The Pennsylvania court held that county commissioners, under statutes requiring them to examine and inquire whether all property had been assessed at full value by local assessors, to receive and consider communications from taxpayers relative to property reduced too low and to revise, raise and equalize assessments, were authorized to adopt necessary and appropriate methods to perform the duties imposed upon them, which methods included the appointment and consideration of the reports of appraisers, since the statute indicated no method by which the necessary information should be obtained. — *Pardee* v. *Schuylkill County*, 120 Atl. 139.

Assessment without Notice.—A resident of a Georgia municipality sought to enjoin the sale of her property for unpaid city taxes. It appeared that she had made no return of the property for taxation and that the assessors had made an assessment thereof without notice to her. The charter of the municipality contained no provision for notice and hearing. The court granted the injunction, holding that notice to the taxpayer, together with an opportunity for hearing, were essential to a valid assessment and that these were legal requisites and not matters of favor or grace.—*Lane* v. *Mayor and Council of City of Unadilla*, 114 S. E. 636.

Exemptions of Dwellings — Uniformity. — The New Jersey court held a statute exempting improvements on real estate for dwelling purposes from taxation for a five-year period unconstitutional on the ground that a pressing emergency could not justify the violation of the constitutional provision requiring all property to be taxed by general laws and by uniform rules, according to its true value and that the police power, broad as it was, could not be exercised in defiance of such constitutional limitation. — *Braunstein* v. *Mayor and Aldermen of Jersey City*, 120 Atl. 19.

Exemption — Land of Educational Institution.—The North Carolina court held that land owned by an educational institution located three miles from its school was not exempt from taxation. It appeared that the rents and profits derived from such land were exclusively applied to educational purposes, but the court held that the statutes limited the exemption to property, the rental or interest of which was used exclusively for religious, charitable or benevolent purposes, which was not broad enough to cover the property of educational institutions.—*Trustees of Lees-McRae Institute* v. *Avery County*, 114 S. E. 696.

Exemption — Merchandise of Religious Organization.—A Mississippi church conducted a book store, and the net revenue therefrom was devoted solely to church purposes. It resisted an assessment of its merchandise, claiming that the same was exempt. The court held the property taxable, on the ground that the statutory exemption applied only to property used for religious purposes and not held for profit, and did not extend to property invested in trade or business for profit, even though the net income might be devoted to religious purposes.—*Gunter* v. *City of Jackson*, 94 So 844.

Exemption — Church Property Not Lawfully Owned.—The Mississippi court held that where a church owns real estate which under the statutes it is not entitled to own, such property is subject to taxation, even though the property of religious organizations is exempt under the statutes, and that in a proceeding to collect the taxes thereon the taxing authority may question the right of the church to own the property sought to be taxed. — *Gunter* v. *City of Jackson*, 94 So. 842.

Inheritance, State — Good Will—Contemplation of Death.—A New Jersey decedent entered into a partnership agreement with his sons, under which he had the right at any time to take over the business and assets of the firm by paying to the sons the value of their shares exclusive of good-will. Shortly before his death a dissolution agreement was executed whereby the sons took over the business and assets, including the good-will, and he became a creditor of the new firm to the amount of his capital investment. Upon

decedent's death the state imposed a transfer tax upon the value of the good-will, which was resisted, on the ground that there was no transfer of good-will; that if any such transfer was made it was not made in contemplation of death or to take effect at death and that even if so made and subject to tax, the valuation was excessive. The court upheld the tax, holding that the practical effect of the transfer made upon the dissolution was a substantial diminution of decedent's assets consisting of good-will which decedent transferred to his sons for nothing. That the transfer was made in contemplation of death was held fully supported by the evidence, which showed that the dissolution was made two months before decedent's death at which time he was seriously ill and when he made his will. The assessment was held not excessive merely because the net earnings for the three years preceding the death and which reflected abnormal post-war conditions were used as a basis for determining the good-will value, as the facts indicated a continually growing business for a number of years.—*In re Hall's Estate,* 119 Atl. 669.

Inheritance, State — Deduction of Dower. — The New York court held that where under a will the widow received a life interest in the residuary estate, no provision being made in lieu of dower, and the executrix being given full power of sale, there was no conflict between her claim for dower and the interests of the other beneficiaries and she was not bound to choose between her dower and the testamentary provision, and that therefore the value of her dower should have been deducted in computing the tax.—*In re Wetmore's Estate,* 197 N. Y. Supp. 508.

Inheritance, State—Statutory Limitation on Bequests. — Under the Oklahoma statutes a decedent may not bequeath more than two-thirds of his property away from a surviving spouse. A husband was the devisee of the entire property of his wife and an inheritance tax was imposed thereon, less the statutory exemption. He resisted the tax, claiming that he should only be taxed on two-thirds of the value because of the above statutory provision.

The court held that the entire transfer was subject to the tax, on the ground that the husband took title to the property under the will and not by the operation of the statute in question. — *In re Whitson's Estate,* 212 Pac. 752.

Inheritance, State — Deduction of Dower.—The New Jersey court held that where a widow under the will of her husband takes the entire estate, she is not entitled to a deduction of the value of her dower in computing the tax unless she takes proceedings to have her dower admeasured; that in the absence of such proceedings the presumption is that the provisions of the will are in lieu of dower, the acceptance of which bars her dower right.—*Arnett* v. *Bugbee,* 119 Atl. 763.

Mandamus by Holders of Municipal Bonds.—The bondholders of an Alabama municipality sought to compel the county tax adjuster to assess the property within the municipality at its full value, although the statutes provided that property might be assessed at only 60% of such value. It appeared that at the time the bonds were issued property was subject to taxation at its full value and the municipality had agreed to levy an annual tax sufficient to pay interest thereon and to set aside a sinking fund to redeem the bonds at maturity. Because of the constitutional provision limiting the tax rate, the municipality under the 60% basis of assessment was unable to comply with the provisions under which the bonds were issued. Mandamus was denied, the court holding that the tax adjuster was governed by the existing law and any assessment on a basis other than the statutory one would be invalid and destroy uniformity in taxation.—*J. B. McCrary Co.* v. *Purvis,* 93 So. 827.

Retaliatory Taxing Statutes Strictly Construed.—Foreign insurance companies in Indiana are required to pay a tax of 3% upon receipts within the state less losses paid therein, unless the state in which any such company is organized imposes a greater tax on Indiana companies. Under the New Jersey statutes insurance companies are required to pay a tax of 2% upon their gross receipts within the state, without any deductions for losses. The state sought to impose an additional tax against a New Jersey corporation because the tax, if computed under the New Jersey

law, was greater. The court held the tax invalid, on the ground that as the statute was retaliatory it must be strictly construed; that it could not be determined from a comparison of the two statutes, that the New Jersey statute imposed the greater tax, and that the statute could not be construed to authorize the administrative officers to look beyond the statutes themselves in order to determine the single facts upon which the Indiana tax was made to depend.—*State* v. *American Insurance Company,* 137 N. E. 338.

Movables — Statutory Situs—Rolling Stock. — In Louisiana, rolling stock belonging to non-residents, operated over the railroads of the state, is required to be assessed and taxed at the domicile in the state declared by the non-resident or otherwise at the state capital. The question was whether the legislature had the power to fix for taxation the situs of movable property within the state. The court upheld the statute, on the ground that the rule "mobilia sequuntur personam" was a mere rule of law and not a fundamental principle of government; that such rule was subject to change by the legislature; and that it prevailed only in the absence of legislative provision to the contrary.—*Gulf Refining Co.* v. *Tillinghast,* 94 So. 418.

Tax Commission's Powers in Mississippi.—The Mississippi court held that the state tax commission was without authority to review the orders of boards of supervisors increasing or reducing assessments of individual taxpayers, and that its power to review was limited to the various classes of property on the rolls, in order to establish an equality assesment throughout the state. — *Board of Supervisors* v. *Laurel Mills,* 94 So. 448.

Foreign Corporation — Excise Tax on Net Income — Application to Corporation Doing Interstate Business Exclusively. — A case, the final decision of which would appear likely to determine some very important questions relating to corporation income taxes, including their application to foreign corporations, particularly those transacting interstate commerce, has been determined by the Massachusetts court, the chief justice observing in his opinion that "this controversy can be settled finally only by the supreme court of the United States."

The case involved the legality of a tax levied upon a foreign corporation engaged in the manufacture and sale of cement, with a principal office in Pennsylvania and with mills in several states, other than Massachusetts. It maintained an office in Massachusetts, in charge of a district sales manager. The value of all its property in that state was $573 and its business therein was wholly of an interstate character. The sole question was as to the legality of the tax imposed under the excise tax law, based upon a combination of a tax upon the value of the corporate excess employed within the state and one upon the net income derived from business within the state. The court defined the tax as an "excise for the privilege of having a place of business under the protection of our laws and with the financial, commercial and other advantages flowing therefrom, measured solely by the property and net income fairly attributable to the business done here by a foreign corporation." The narrow and heretofore undetermined question was thus presented, whether such a tax, so measured, could be imposed upon a foreign corporation engaged solely in interstate commerce. Upon the basis of past decisions, one would be strongly inclined to answer no, but the fact that a court of the strength of the one in question has answered yes indicates the important and interesting character of the case.

The corporate excess factor of the tax was computed at a given rate upon such portion of the value of the entire capital stock as the value of the real and personal property employed in business in the state bore to the total assets, less certain deductions. This factor of the tax the court held authorized under the decisions, because in lieu of a property tax, the tax being in lieu of all taxes upon the personal property of this corporation, citing *W. U. Tel. Co.* v. *Mass.,* 125 U. S. 530; *Pullman Co.* v. *Pennsylvania,* 141 U. S. 18; *A. & P. Tel. Co.* v. *Philadelphia,* 190 U. S. 160, 163; *U. S. Exp. Co.* v. *Minnesota,* 223 U. S. 335, 345; *Shaffer* v. *Carter,* 252 U. S. 37, 52. The court observed that this corporation, which had gross receipts from business within the state of $424,982, must have acquired credits, bills and ac-

counts receivable and obligations in considerable amounts, which could have been subjected to direct taxation, by appropriate legislation and which constituted a part of the value of the assets employed by the company within the state, and hence a part of its "corporate excess." These assets were thus taxed indirectly, by the corporate excess factor of the tax.

As to the net income factor of the tax, the court relied upon the decisions sustaining a tax upon non-residents, such as *Travis* v. *Yale and Towne Mfg. Co.,* 252 U. S. 60, and *Shaffer* v. *Carter, supra.* The fact that the net income was derived solely from interstate commerce was held not to invalidate the tax, under the decisions in *Peck* v. *Lowe,* 247 U. S. 165, 174; *Shaffer* v. *Carter, supra,* at p. 57; *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 119; *Hump Hairpin Co.* v. *Emmerson,* 258 U. S. 290, 294; *Attorney General* v. *Bay State Mining Co.,* 99 Mass. 148, and *U. S. Glue Co.* v. *Oak Creek,* 247 U. S., from which an extensive citation was quoted, from pages 328 and 329.

The case was distinguished from the long line of decisions based upon *W. U. Tel. Co.* v. *Kansas,* 216 U. S. 1, as being governed by the other line of decisions, above noted, and reference was made to the cases collected and reviewed in 32 Harvard Law Review, 634-640, 646-649. It was also distinguished from the line of decisions in cases where the tax was a license tax imposed as a condition prerequisite to doing interstate commerce. It is at this point that the decision seems to require the federal court's approval. An excise or franchise tax seems perilously near to being in law a license or privilege tax. The uniformity clause of the Massachusetts constitution has been so construed as to emphasize the classification of this tax as an "excise" tax, as distinguished from a property tax. It is hence difficult to distinguish it from a license or privilege tax, especially as the act itself declares the tax to be an excise "with respect to the carrying on or doing of business," and the definition of the tax made by the court, above quoted, is that it is an excise for a privilege.

The method of allocation of the net income was held not to be objectionable as including property outside the state. The combination of the percentages produced net income allocated to the state of $15,370, out of total net income of $1,148,041, which was not deemed in excess of a just amount and was held supported by the *Underwood* decision.

At this point, one is inclined to raise a question. The details of the allocation are not shown in the opinion, but if it be assumed that the total net income as returned to the federal government was allocated and that such net income included interest from intangible securities, it is difficult to see why a portion of property wholly beyond the jurisdiction of the state was not in effect brought into the state. This suggestion is based upon the assumption that under the Massachusetts decisions an income tax, inherently considered, is a property tax (*Hart* v. *Tax Commissioner,* 132 N. E. 128). May a state, by the use of the word "excise" avoid the effect of this decision and thus accomplish indirectly the taxation of property beyond its borders?

The review of this decision by the United States Supreme Court will be awaited with interest, as settling many puzzling questions.—*Alpha Portland Cement Co.* v. *Commonwealth,* 139 N. E. 158 (April 16, 1923).

SOME EXPERT LEGAL OPINION ON INCOME TAX LAW

We reprint herewith some legal opinions which appear to have escaped the attention of the honorable editor of the Decisions and Rulings Department.

Q. I bought a case of hootch from a bootlegger for $120. Analysis proved it was diluted 50 per cent with water. Can I claim a deduction?

A. You appear to have a double claim. Losses by fire and water, unless compensated for by insurance, are deductible. You have a loss by water. You also have a fire-water loss.

Q. I have a flivver which I use in business, but also to give my family the air on Sundays. Can I charge its maintenance to business expense or would it be regarded as a pleasure car?

A. Best legal opinion is that a flivver is not a pleasure car.

Q. I won $1,000 in bets on a "rasslin" match. Is this income?

A. We cannot conceive any one winning $1,000 on a wrestling match unless he were in on the "frame", which would be an illegal transaction, on which we cannot offer advice.

Q. I exchanged 20 shares of Southern Pacific, bought for 85, for 200 shares of Mammoth Flow Oil Wells, now being drilled, which the salesman says will be worth $100 per share inside of 6 months. What shall I report?

A. Report to an alienist.

—*Chicago Tribune.*

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